The Central Law Journal.

ST. LOUIS, AUGUST 14, 1891.

One of the daily press thinks it more than likely that, within a period of the next two years, the average age of members of the United States Supreme Court will be brought somewhat below the high level of the present period and of recent times. The report that Justices Field and Bradley will resign this year is generally credited. The former is seventy-five years of age and the latter seventy-eight. Each could long ago have stepped down under the law. Justice Blatchford will have the same privilege next year. He will, at that time, have reached the required age and time limit. The oldest of the other justices are still several years below the seventy-year mark. President Harrison's policy, in supplying vacancies on the supreme bench, has been to select men in middle life. One of his appointees, Justice Brewer, is fifty-five years old, and the other, Justice Brown, is fifty-six. Apparently his purpose is to put young men in that tribunal as openings occur. When the two vacancies referred to took place, men better known to the country, than either of the appointees, were suggested for selection, but the element of age evidently entered into the calculation and had some effect in dictating the choice.

It would seem that the president is not making any innovation in tradition or practice by keeping well below the sixty-year limit in his selections for the highest bench. The custom has been, during a large part of the national existence to recruit that court from among the jurists who have not passed far within what is called the middle period of life. Justice Miller was forty-six when selected by President Lincoln, and Justice Field, when named by the same executive, was forty-seven. The majority of the men who acquired great reputation in the court were comparatively youthful when entering it. John Marshall, when beginning his thirty-four years of illustrious service, was forty-six. Joseph Story, who served almost as long, and with nearly equal distinction, was only forty-two on entering on his duties. Benjamin R. Curtis, who won the reputation of being one of the greatest constitutional lawyers of the country during his brief career on the bench, was the same age as Story. There is an obvious advantage to the public service in the selection of men for the supreme bench who can, in the natural course of things, be relied on for eighteen or twenty years of duty; for experience has shown that their usefulness, as well as their prestige, increases with the years which they remain at work.

The last Illinois legislature enacted some laws, in the pretended interest of workingmen, which are now giving no small amount of trouble to the employers of that State, as well as the employed. One of these acts provides for the payment of wages by miners and manufacturers in lawful money, and prohibits what is known as the "truck store" system and the deduction from wages of employees, except for lawful money actually advanced, making it an offense for a miner or manufacturer to dun or to be indirectly interested in any store for the furnishing of supplies, etc., to its employees. Another act, intended to affect coal miners only, known as the "gross weight law," provides for the weighing in gross of coal hoisted at mines, and makes it unlawful for any owner of mines, whose miners are paid upon the basis of the quantity of coal which each shall mine and deliver, to take any portion of same by any process of screening without fully accounting for and crediting the same. Another act of a general character and intended to affect all corporations provides for the weekly payment of employees. This act does not apply to steam railroads, but it does apply to municipal corporations. It is stated that the constitutionality of the latter act is to be tested. It will be observed that the act does not go to the length of the Indiana measure upon the same subject, which required the payment of wages in lawful money, and which undertook to render void all contracts by employees to accept anything but lawful money—a feature which the Supreme Court of Indiana declared valid, but which, in our judgment at the time (30 Cent. L. J. 405), seemed an unwarrantable exercise of legislative power. Shorn of this bad feature of the Indiana act, the weekly

payment law passed by the Illinois law makers is not nearly so objectionable or vulnerable as the "truck store act," mentioned above.

NOTES OF RECENT DECISIONS.

ATTORNEY AND CLIENT—PRIVILEGED COMMUNICATIONS—KNOWLEDGE BY ATTORNEY OF CRIMINAL INTENT OF CLIENT.—The case of Matthews v. Hoagland, 21 Atl. Rep. 1054, decided by the New Jersey chancery court, presents an interesting phase of the question as to the privileged character of communications between attorney and client. It is there held that the privilege of professional secrecy is not confined to the knowledge derived by counsel from communications made to him by, or in conference with, the clients, but extends to information obtained from documents submitted for his inspection or custody. If the communication or conference between client and counsel is to devise means by which a crime is to be committed, in which the attorney takes an active part, there is no privilege; he ceases to be counsel, and becomes *particeps criminis*. If he takes no part, there is no professional privilege, because it cannot be a solicitor's business to advise in furtherance of a criminal object. The contriving of a crime or a fraud is no part of the professional occupation of an attorney or solicitor. In order that the rule of professional privilege may apply, there must be both professional employment and professional confidence. If the client has a criminal or fraudulent object in view in his communication with his counsel, one of those elements must necessarily be absent. If the object is avowed, the client does not consult his adviser professionally; if it is not disclosed, he reposes no confidence. Green, V. C., says:

> The privilege of professional secrecy is not confined to the knowledge derived by counsel from communications made to him, by or in conference with the client, but extends to information obtained from documents submitted for his inspection or custody. Wheatley v. Williams, 1 Mees. & W. 533; Robson v. Kemp, 5 Esp. 53; Brard v. Ackerman, *Id.* 119; Coveney v. Tannahill, 1 Hill, 36; Brandt v. Klien, 17 Johns. 338; Brown v. Payson, 6 N. H. 443; Gray v. Fox, 43 Mo. 570; Crawford v. McKissack, 1 Port. (Ala.) 433; Dietrich v. Mitchell, 43 Ill. 40. It was next insisted that the rule did not apply in this case, because the consultation between the parties was in furtherance of the commission of a crime or the perpetration of a fraud. I held on the trial that the privilege did extend to communications from the client to counsel of what the client had already done with reference to the subject-matter of the consultation; but that, if the communication or conference was to devise means by which a crime was to be committed, in which the attorney took an active part, either by advice or cooperation, his position as counsel ceased, and he became *particeps criminis*, and that no privilege extended to what transpired between them at the concoction of such conspiracy. The witness manifested no disposition to testify on this basis, and he was not pressed to do so under the ruling. Serious uncertainty has undoubtedly existed as to whether a fraudulent purpose in the subject matter of the employment deprives the client of the right to close the lips of counsel, or whether the rule of privilege extends to communications the object of which may have been in furtherance of fraud. It has arisen from a conflict of decision, in England and in this country, even between courts in the same State. On the trial I followed the decision of Chancellor Walworth in Bank v. Mersereau, 3 Barb. Ch. 528, as later than that in Coveny v. Tannahill, 1 Hill, 36. Chief Justice Bronson in the latter case had said: "Now, if the plaintiff consulted counsel beforehand as to the means, the expediency, or consequences of committing such a fraud, his communications may, perhaps, be privileged; and they are clearly so, as to what he may have said to counsel since the wrong was done. But the attorney may, I think, be required to disclose whatever act was done in his presence towards the perpetration of the fraud. One who is charged with having done an injury to another, either in his person, his fame, or his property, may freely communicate with his counsel, without danger of having his confidence betrayed through any legal agency. But when he is not disclosing what has already happened, but is actually engaged in committing the wrong, he can have no privileged witness." Chancellor Walworth in Bank v. Mersereau, 3 Barb. Ch. 528, 598, says: "The seal of professional confidence, I believe has never been held to cover a communication made to an attorney to obtain professional advice or assistance as to the commission of a felony or other crime which was *malum in se*. The opinion of Chief Baron Gilbert certainly was that the privilege of attorney and counsel did not extend to such cases (1 Gilb. Ev. 277); and as no one is entitled to the advice or assistance of counsel, or of an attorney, to enable him to do an illegal act, if the question had arisen for the first time in this case, I should have no hesitation in deciding that the communications made by Hoffman and Mersereau to their attorney were not privileged, because they were made for the purpose of getting his professional assistance in the perpetration of a fraud upon their creditors. It is as contrary to the duty of an attorney or a counselor to aid his client, by professional services, in the perpetration of a fraud, or in the violation of any law of the State, as it is to aid him in the commission of a felony, although the moral turpitude of the act may be much greater in the one case than in the other. I can therefore see no good reason for extending the principle of privileged communications to the first class of cases, and not to the last. The practice, however, appears to have been otherwise for more than a century and a half, and I do not now feel authorized to adopt a new rule on the subject." After citing various authorities that the existence or disclosure of a fraudulent purpose did not remove the obligation to treat the communication as privileged, he continues at page 600: "With the exception of what was said by Mr. Justice Bronson in Coveney v. Tannahill, 1 Hill, 36, my researches have

not enabled me to find anything in conflict with the decisions to which I have referred. I therefore do not feel authorized to say that the fact that Cotton was employed by Hoffman and Mersereau to assist them in a transaction which, from what was said in his presence, he must have known to be a fraud upon their creditors, deprived their communication of the seal of professional confidence. I admit, however, that I should have been much better satisfied if I had found this question an open one; or, rather, if I had found the decisions of the courts the other way; for I think, with the late chief justice of our supreme court, that the privileged relations of attorney and client ought to be permitted to exist only for honest purposes, and not to enable the client to perpetrate a fraud, or to violate the laws, under the advice of counsel, or through any other professional aid." The learned chancellor, therefore, felt compelled, by the weight of the authorities which he cited, to hold as he did, although he thought principle and morals could have been better sustained had the court laid down the rule differently.

Of the cases cited by the chancellor as controlling his action, Foster v. Hall, 12 Pick. 89, was the most recent. It is a decision by Chief Justice Shaw. So much of the opinion as holds the point in question is based on an extract from Cromack v. Heathcote, 2 Brod. & B. 4, and Doe v. Harris, 5 Car. & P. 592. Chancellor Walworth, at 599, also refers to them, stating the point as decided in each. So far as they hold that professional privilege extends to a transaction for an illegal or fraudulent purpose, Cromack v. Heathcote and Doe v. Harris are expressly overruled in Queen v. Cox, 14 Q. B. Div. 153, while the other two cases cited by him (Anon., Skin. 404; Anon. Holt, 76; Anon., 1 Ld. Raym. 733; Holt v. Tyrell, Bull N. P. 284; and Hyde v. M., 1 Moll. 450) must be regarded as disapproved. This recent case has thus so undermined the authorities which Chancellor Walworth felt constrained to follow, we are forced to the conclusion that, had the decisions stood at that time as they do now, he would have held as he thought principle and the character of the profession demanded. * * * As I understand the case, the rule in its different phases and the reasons may be thus stated: If the client consults the lawyer with reference to the perpetration of a crime, and they co-operate in effecting it, there is no privilege; for it is no part of an attorney's duty to assist in crime—he ceases to be counsel and becomes a criminal. If he refuses to be a party to the act, still there is no privilege, because he cannot properly be consulted professionally for advice to aid in the perpetration of a crime. In the case of a fraud, if it is effected by the co-operation of the attorney, it falls within the rule as to crime, for their consultation to carry it out is a conspiracy, which on its accomplishment, by the commission of the overt act, becomes criminal, and an indictable offense. If the client discloses his fraudulent purpose, and the attorney does not join in the scheme, but repudiates all connection with it, there cannot be, properly speaking, professional employment to effect such purpose, and consequently there is no privilege. If the client does not frankly and freely disclose his object and intention as well as facts, there is not professional confidence, and consequently no privilege. It proceeds on the ground that the privilege is that of the client, and bases his right to claim it, or liability to lose it, on his own conduct. If it has been such that its criminal and fraudulent object and purpose puts him beyond the pale of the law's protection, or if to conceal it he has not reposed full confidence in his counsel, he cannot invoke a rule which the law has created, as Lord Brougham said (in Greenough v. Gaskell, 1 Mylne & K. 98), "out of regard to the interests and the administration of justice." The question has never been decided in any reported case in this State, and, in my judgment, the rule, as laid down by the court of queen's bench, should be adopted, not only on account of the great weight of such an authority, but because it puts the question of privileged communications on high ground of honesty and integrity, worthy of the dignity and honor of the profession of the law. The principal case was on indictment, but the rule is as imperative in civil causes; the only difference being in the method of its application.

SPECIFIC PERFORMANCE—ILLEGAL CONTRACT—EVASION OF STATUTES.—In Sprague v. Rooney, 16 S. W. Rep. 505, the Supreme Court of Missouri decided that where a house is rented for use as a brothel, and, to evade the statutes in such case made and provided, a written agreement is entered into for the sale of the house on monthly payments until a certain sum shall have been paid, when the landlord agrees to execute a conveyance and to take a deed of trust for the balance of the purchase money, the agreement is illegal, and will not be specifically enforced after the stipulated monthly payments have been made, thus overruling Sprague v. Rooney, 82 Mo. 493. Sherwood, C. J., says:

If there be one principle of the law well settled, it is this: That a contract, express or implied, based on an illegal consideration, whether that consideration appear on the face of the contract or be proved *aliunde*, cannot be enforced either at law or in equity; that the moment the illegality of the contract is disclosed the gates of legal and equitable relief and remedy are at once shut against the party who seeks to enforce such a contract. Nor is it necessary that such contract, when it violates the provisions of a statute, should be declared void by that statute, in order that the courts should refuse to enforce it, when relief based upon it is asked at their hands. These positions are sustained, perhaps, by as great an array of authorities as is to be found on any other one topic of the law. Thus in the case of Bank v. Owens, 2 Pet. 538, Johnson, J., said: "No court of justice can in its nature be made the handmaid of iniquity. Courts are instituted to carry into effect the laws of the country. How can they become auxiliary to the consummation of violations of law? There can be no civil right where there can be no legal remedy, and there can be no legal remedy for that which is itself illegal." The same principles are recognized in Coppell v. Hall, 7 Wall. 558. Justice Swayne, commenting on the instruction of the court below, that the illegality had been waived by the act of the defendant, says: "In such cases there can be no waiver. The defense is allowed, not for the sake of the defendant, but of the law itself." Again: "Whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case. No consent of the defendant can neutralize its effect. A stipulation in the most solemn form to waive the objection would be tainted with the vice of the orig-

inal contract, and void for the same reasons. Where the contamination reaches, it destroys. The principle to be extracted from all the cases is that the law will not lend its support to a claim founded on its own violation." In Mitchell v. Smith, 1 Bin. 110, a case of the sale and purchase of a Connecticut title to Pennsylvania lands, Shippen, C. J., says: "The contract is illegal, being founded on a breach of the law, and of consequence a void contract, and cannot be enforced in a court of law." In Seidenbender v. Charles, 4 Serg. & R. 151, it was held there could be no recovery upon a ticket in an illegal lottery. Tilghman, C. J., says: "I consider it as perfectly settled that an action cannot be sustained, founded on a transaction prohibited by statute, although it be not expressly declared that the contract is void." Page 160. Yeates, J., said: "The principle of public policy is that no court will lend its aid to a man who grounds his action upon an immoral or illegal act. Justice, as between these individuals, would require either payment of the money or reconveyance of the property, but principles of public convenience demand that the justice of the case shall yield to higher considerations —the operation of the precedent on public morals and the public interest. It is for these reasons courts of justice will not assist an illegal transaction in any respect." To the same effect, see Fowler v. Scully, 72 Pa. St. 456; Brua's Appeal, 55 Pa. St. 294; De Groot v. Van Duzer, 20 Wend. 390; Reynolds v. Nichols, 12 Iowa, 398; 2 Kent's Com. (13th ed.) 466, and cases cited; Sumner v. Summers, 54 Mo. 340; Cheltenham v. Cook, 44 Mo. 29; Kitchen v. Greenabaum, 61 Mo. 110. In White v. Buss, 3 Cush. 448, Shaw, C. J., said: "It is well settled by the authorities that any promise, contract or undertaking, the performance of which would tend to promote, advance or carry into effect any object or purpose which is unlawful, is in itself void, and will not maintain an action. The law which prohibits the end will not lend its aid in promoting the means designed to carry it into effect, and in this respect the law gives no countenance to the old distinction between *malum in se* and *malum prohibitum*. That which the law prohibits either in terms or by fixing a penalty to it, is unlawful; and it will not promote in one form that which it declares wrong in another." And it does not at all alter the principle to be applied in such cases because the instrument declared on is in one form, while the statute levels its denunciations and penalties at an instrument in another form. The law looks at the substance of things, not at their shadows. To say that the law prohibits a lease being made of a house to be used as a bawdy-house, and that the courts will refuse to enforce such a contract, but that, if such contract takes on the form of deed or contract of absolute sale, then the courts would have to enforce such a subterfuge, is unsustained by either reason or authority, and at war with both.

In this case the evidence, which was entirely competent for that purpose, tends very strongly to show the illegality of the contract aforesaid. In such case, such evidence is not introduced to "vary or control the contract," but to show that in contemplation of law, in consequence of the proven illegality, no contract at all ever had an existence; that it was void *ab initio*. 2 Pars. Cont. (6th ed.) 554; 1 Greenl. Ev. (14th ed.) § 284, and cases cited. The case of Sprague v. Rooney, *supra*, is opposed to this view; but, that case being without support in reason or precedent, we overrule it.

VENDOR'S LIEN — ASSIGNMENT — ATTACHMENT.—A question upon which there is some conflict of opinion was decided by the Supreme Court of California in Glessner v. Palmater. It was there held that were the owner of land contracts to convey it upon the payment of a certain price, for which he accepts notes, but the title is not to pass until the notes are paid, the land is, by express contract, held in pledge for such payment, and the notes and contract are in the nature of a mortgage, and the lien will pass to the assignee of such a note. Paterson, J., says:

There is, perhaps, no subject of equity jurisprudence discussed in the books upon which there is a greater diversity of opinion than exists in relation to the origin, nature and effect of a vendor's lien, against whom and in whose favor it avails, and how it may be discharged or waived. Hammond v. Peyton, 34 Minn. 531, 27 N. W. Rep. 72. The various definitions given and principles applied to it by the courts, are hopelessly irreconcilable; and, if we take the expressions found in decisions and text books, without observing the distinction between the lien implied by law in favor of a vendor who has parted with the legal title and taken no security for the purchase money, and the security which the vendor has while he holds the legal title under an unexecuted contract for the conveyance of lands upon payment of the purchase money, there will appear to be great confusion and inconsistency. The former, the implied lien, is properly known as a "vendor's lien." It is the creature of courts of equity, founded upon the equitable presumption that where the vendor has parted with his title and taken no security for the payment of the purchase money, the parties intended that the property itself should remain as a pledge for the payment of the purchase price of the land. The lien thus created by implication is not a specific, absolute charge upon the property; it is personal to the vendor, and does not pass by a transfer of his claim for the purchase money. The fee is in the purchaser, and he may defeat the lien by a conveyance to a *bona fide* purchaser for value. Sparks v. Hess, 12 Cal. 186; Baum v. Grigsby, 21 Cal. 172; Lehndorf v. Cope, 122 Ill. 233, 13 N. E. Rep. 502. The latter is properly designated as a vendor's lien. Where the vendor holds the legal title under an unexecuted contract for the conveyance of land upon payment of the purchase money; the transaction shows upon its face that he holds it as security. The vendee cannot prejudice that title, or in any way divest it, except by performance of the act for which the vendor holds it. The vendor's security is something stronger than a mortgage, because the legal title is retained as security. Stevens v. Chadwick, 10 Kan. 413. It has been called an "imperfect" or "equitable" mortgage, which is a more appropriate term than "vendor's lien." Moore v. Lackey, 53 Miss. 85. In many of the best considered cases, including Sparks v. Hess, *supra*, it is treated as if it had the similitude of a mortgage, subject to foreclosure the same way a mortgage is foreclosed. There is no necessity for any lien by implication. Where the title is not to pass until the vendee pays the purchase price, the land is by express contract held in pledge for such payment, and the notes and contract may be considered as an in-

strument in the nature of a mortgage. It is a lien by contract, is an incident to the debt, and the assignee of notes given for the purchase money, like the assignee of a note secured by mortgage, is entitled to the benefit of the security. Avery v. Clark (Cal.), 25 Pac. Rep. 919; Wright v. Troutman, 81 Ill. 374; Adams v. Cowherd, 30 Mo. 460; Lowery v. Peterson, 75 La. 109; Bradley v. Curtis, 79 Ky. 327; McClintic v. Wise, 25 Gratt. 488; Lagow v. Badollet, 1 Blackf. 419; Dingley v. Bank, 57 Cal. 471. There are a few decisions to the contrary, some of which inveigh against the rule, and, emanating, as they do, from highly respectable authority, are entitled to careful consideration; but they bear evidence of a departure from sound legal rules, and will be found generally to have been influenced by decisions in cases where the legal title had passed to the vendee, thus overlooking the distinction we had attempted to point out, and which is paramount always in determining questions of this kind. The authorities preponderate very decidedly in favor of the view we have expressed. 2 Jones, Liens, § 1119, note.

McFarland, J., dissenting from the conclusion of the court, says:

I dissent, and adhere to the views expressed in the former opinion. 24 Pac. Rep. 608. I cannot subscribe to the doctrine that the owner in fee of land, who simply agrees to convey it upon the payment to him of certain money evidenced by a promissory note, is in the same condition as one who conveys the land and takes back a mortgage; or that if, in the former case, he merely assigns the promissory note, the assignee of the note has a lien on the land. If the latter can enforce such a lien, he must be able to release it. But how could he release it? It could be released only by conveying the land to the vendee, but how could he convey that which he hath not? If, after the assignment of the note, the vendor should convey the land to the vendee, what then would be the condition of the supposed lien of the assignee of the note? The whole doctrine must rest on the untenable proposition that the assignment of a negotiable promissory note is a conveyance in fee of land.

I know that some of the recent text-writers speak of such a case as bearing "a strong similitude to that of a mortgagee and mortgagor," and say that, although it "is often spoken of in the cases as a vendor's lien," yet, in their opinion, such language is "a misuse of terms;" and that, although "it has been said in English and American decisions, that the vendor's lien may arise before conveyance as well as after," yet, that this saying "confounds legal notions which are essentially different." But, in my opinion, those "English and American decisions" correctly state the law, and tend to prevent confusion. In this State Sparks v. Hess, 15 Cal. 194, is the leading case on the subject. In that case the court say: "This is not a suit to enforce a vendor's lien after conveyance executed, but to enforce such lien when the contract of sale remains unexecuted;" and that, while the position of the vendor is "in some respects" like that of a mortgagee, it is in other respects different. The vendor is at liberty to ask either a decree directing performance, and in case of refusal a sale of the premises, or a decree barring the right of the vendee to claim a conveyance under the contract. Throughout the whole case the right of the plaintiff is treated as and called a "vendor's lien;" and there is no doctrine better established than that a vendor's lien is not assignable. In the case at bar there was no conveyance of the legal title from the owner of the land (Webster) to the assignee of the note; and in my opinion, the mere assignment of the note carried no title to the land, and no vendor's lien, or any lien at all. But, in my opinion, a vendor's right is too shadowy to be a lien, within the meaning of the attachment law.

MASTER AND SERVANT—DEFECTIVE APPLIANCES — CONTRIBUTORY NEGLIGENCE. — The opinion of the Michigan Supreme Court in the case of Baux v. Blogett and Davis Lumber Co., 48 N. W. Rep. 1092, contains a review of the leading authorities upon the question of defective machinery in the law of master and servant. In this action, for personal injuries received through dangerous machinery, which was left unprotected, it appeared that it was properly covered at the time plaintiff was employed by the defendant, and that during the work the covering was broken, and that on that very day plaintiff called the attention of defendant's superintendent to the defect, and that he promised that it should be remedied that night; that next morning, no protection having been provided, plaintiff again spoke to the superintendent, who said that he would fix it at noon, and directed plaintiff to continue his work, but to take care of himself till noon; and that plaintiff resumed his work, but during the morning lost his balance, fell upon the machinery, and had his leg crushed, it was held that the danger was temporary in its character, and not incidental to plaintiff's employment, and he is not precluded from maintaining his action by the fact that, though he knew of the danger, he nevertheless returned to his work in immediate proximity to it; and it was error to take the case from the jury. McGrath, J., says *inter alia*:

As was said in Greene v. Railway Co., 31 Minn. 248, 17 N. W. Rep. 378: "If the emergencies of a master's business require him temporarily to use defective machinery, we fail to see what right he has in law or natural justice to insist that it shall be done at the risk of the servant, and not his own, when, notwithstanding the servant's objection to the condition of the machinery, he has requested or induced him to continue its use under a promise thereafter to repair it." Mr. Cooley, in his work on Torts, (sections 555, 559), says: "It has been often—and very justly—remarked, that a man may decline any exceptionally dangerous employment; but if he voluntarily engages in it he should not complain because it is dangerous. Nevertheless, where one has entered upon the employment and assumed the incidental risks, it is not reasonable to hold that other risks, which he is directed by the master to assume, are to be left to rest upon his shoulders merely because he did not take upon himself the responsibility of throwing up the employment, instead of obeying the order. Many considerations might reasonably induce the servant to hesitate under such circum-

stances. In many cases the consequences might be very serious should he refuse to obey a lawful command of the master; any command may not be clearly and manifestly unlawful which directs the doing of nothing beyond the general scope of the business. The servant who refuses to obey must consequently expect to take upon himself the burden of showing a sufficient cause for the refusal. However clear the case might be to him, it might not be easy to make a showing satisfactory to third parties, who would naturally assume that the order was given in good faith, and that the master understood better than another the risks to be encountered in his business. The servant also, it may reasonably be assumed, would to some extent have his fears allayed by the commands of a master, whose duty it would be not to send him into danger, and who might therefore be supposed to know, when he gave the command, that the dangers were not such or so great as the servant had apprehended " "It is also negligence for which the master may be held responsible, if, knowing of any peril which is known to the servant also, he fails to remove it in accordance with assurances made by him to the servant that he will do so. This case may also be planted on contract, but it is by no means essential to do so. If the servant, having a right to abandon the service because it is dangerous refrains from doing so in consequence of assurances that the danger shall be removed, the duty to remove the danger is manifest and imperative, and the master is not in the exercise of ordinary care unless or until he makes his assurances good. Moreover, the assurances remove all ground for argument that the servant by continuing the employment engages to assume its risks. So far as the particular peril is concerned, the implication of law is rebutted by the giving and accepting of the assurance; for nothing is plainer or more reasonable than that parties may, and should, where practicable, come to an understanding between themselves regarding matters of this nature." Deering on Negligence, § 196, says: "Where injury results from anything that is incident to the employment, but from a temporary peril, to which he is exposed by the negligent positive acts of the employer, he can recover." 1 Shearman & Redfield on Negligence, § 209, say: The servant cannot avoid responsibility "if he continues to work for any considerable time, knowing these facts, without being induced by his master to believe that a change will be made, and without making any complaint of such defects, or calling the attention of his master to them." The doctrine laid down by these authors is supported by a long line of well-considered cases. In Greene v. Railway Co., *supra*, plaintiff was in the service of defendant as locomotive engineer on a train running between Minneapolis and Albert Lea. On reaching the former place in the morning with his train, upon examining his engine he discovered that the "chafing irons" between the engine and tender were partly broken off. He immediately reported the fact on the "repair-book" to the foreman of the round-house, whose duty it was to have the repairs made, and to direct what engine should go out. On returning in the evening to go out with his train he found the engine out, but not repaired. On inquiring of the foreman why the repairs had not been made, the reply in substance was that he had not had time. On plaintiff suggesting that he did not like to take out this engine; that it was not safe; the foreman replied that he was short of engines to do the work of the road, and had no other to send out, and added: "Proceed with that, and you can get it fixed at Lea, if you have time; if not, I will remedy it when you get back." The plaintiff did so, and on the way collided with another train (for which he does not appear to be responsible), and in attempting to escape was caught between the engine and tender, the defects in the "chafing irons" causing the engine to override the tender, and close up the gangway through which he was attempting to escape. In Manufacturing Co. v. Morrissey, 40 Ohio St. 148, plaintiff was working upon a jointer which was out of repair. In Clarke v. Holmes, 7 Hurl. & N. 937, plaintiff was employed to oil dangerous machinery. When he entered upon the service certain of the machinery was fenced, but the fencing became broken by accident. In Hough v. Railroad Co., 100 U. S. 213, there was a defect in the locomotive which plaintiff had in charge.' "There can be no doubt," say the court, "that where a master has expressly promised to repair a defect the servant can recover for an injury caused thereby, within such a period of time after the promise as it would be reasonable to allow for its performance, and, as we think, for an injury suffered within any period which would not preclude all reasonable expectation that the promise might be kept." In Railroad Co. v. Duffield, 12 Lea, 63, plaintiff was supplied with a defective hammer to drive railroad spikes. He testified: "Of course, I was obliged to see that the hammer was broken. Any man what wasn't blind could see the condition of the hammer. I knew when I saw it that it wouldn't do to drive spikes with, and that is why I spoke to the section boss about it." In Furnace Co. v. Abend, 107 Ill. 44, a locomotive foot-board was defective, from which deceased fell, while oiling the engine. In Parody v. Railway Co., 15 Fed. Rep. 205, the injury was occasioned by a defective draw-bar. In Lanning v. Railroad Co., 49 N. Y. 521, the court say: "Where the servant has full and equal knowledge with the master that the machinery or materials employed are defective, or that the fellow-servant is incompetent, and he remains in the service, this may constitute contributory negligence; but if it appears that the master has promised to amend the defect, or other like inducement to remain has been held out to the servant, the mere fact of his continuing in the employment does not of itself, as matter of law, exonerate the master from liability, but the question of contributory negligence is one of fact for the jury." See, also, Pieart v. Railway Co. (Iowa, 1891), 47 N. W. Rep. 1017; Kane v. Railway, 128 U. S. 91, 9 Sup. Ct. Rep. 16; District of Columbia v. McElligott, 117 U. S. 621, 631, 6 Sup. Ct. Rep. 884; Railway Co. v. Drew, 59 Tex. 13; Patterson v. Railway Co., 76 Pa. St. 389; Mehan v. Railroad Co., 73 N. Y. 585; Booth v. Railroad Co., *Id.* 88; Coombs v. Cordage Co., 102 Mass. 572-578; Greenleaf v. Railway Co., 33 Iowa, 53. This principle has been recognized and approved by this court. In Railway Co. v. Bayfield, 37 Mich. 205, the servant was justified in obeying the orders of his superior. Justice Cooley (page 212) says: "The risk was not fairly upon the servant's shoulders," and again: "We agree with the Supreme Court of Pennsylvania, that when a servant, in obedience to the orders of his superior, incurs the risks of machinery which, though dangerous, is not so much as to threaten immediate injury, or where it is reasonably probable that it may be safely used by extraordinary caution or skill, the case is not to be regarded as one of concurring negligence;" citing Patterson v. Railway Co., 76 Pa. St. 389-394. In Swoboda v. Ward, 40 Mich. 420-422, the court, after laying down other general rules, says: "If the servant, with full knowledge of the facts, and understanding the risks occasioned thereby, in the absence of any promise by the master to remedy the same, consents to and re-

mains in the master's employ, then he voluntarily incurs such increased risks." See, also, Lyttle v. Rail-Co. (Mich.), 47 N. W. Rep. 571; Jones v. Railway Co., 49 Mich. 573, 14 N. W. Rep. 551, recognizes the right of the servant to show that he did not consent or agree to the change or performance of extra duties, and that he did not freely and voluntarily enter upon a discharge of new duties imposed. The new duties in that case involved extra hazard.

It is insisted, however, that the dangerous condition and character of this machinery was known to plaintiff, and that he was guilty of concurring negligence in approaching it; that he did not excercise ordinary care, and might have gone around on the other side of the rollers, and thus have avoided the danger. Knowledge of the existence of a defect or danger, while it is evidence of contributory negligence, is not conclusive. In the cases already referred to the existence of the danger, was known to plaintiff, and in all of them it is held that the question of defendant's contributory negligence is for the jury. See Coombs v. Cordage Co., 102 Mass. 572-578.

THE POWER OF THE COURT OF EQUITY TO GIVE RELIEF AGAINST A JUDGMENT AT LAW.

The courts of the States where there is no code, and of the United States have concurrent jurisdiction at law and in equity. This jurisdiction is with few exceptions exercised by the same court known as the court of original jurisdiction. The court of equity grew up from the necessity to provide for a remedy and to grant relief, where there was no adequate remedy at law.

One of the powers of the court of equity is to modify, restrain, vacate or enjoin the enforcement and collection of a judgment obtained in a court at law. When the court of equity exercises this power, it does not assume to exercise appellate jurisdiction, nor to set aside the law; but to decree what is equitable and to prevent the rigid rules of law from doing an irreparable wrong.

A court at law may render a judgment against a party on a debt which has been paid, or when the defendant has a good defense on the merits and was not present to make a defense from sudden sickness, or from unavoidable accident, or from misrepresentations or acts of the opposite party, or when the court had no jurisdiction upon a false return of the officer, showing service when none was made, or for a much larger sum than is actually due through a mistake or misapprehension of the facts, or by consent of counsel without authority or knowledge of the defendant, or against the defendant who colludes with the plaintiff to cheat an honest creditor of such defendant.

When a judgment has been obtained under any of the foregoing circumstances, equity will give relief. But equity will not give relief to retry the issue already tried, nor when the alleged reasons, as perjury of the witnesses, have not been judicially or conclusively established, nor when the judgment is not shown to be unjust, and its payment unconscionable, nor where no defense was made by reason of the negligence of the defendant.

The question is, when may a court of equity interpose its power against a judgment at law, by whom may it be done, and for what reasons? Other questions also arise; whether another court of equal jurisdiction may exercise this power? When a motion for a new trial has been made and denied in a court at law, what force is given to that decision? Is there any distinction to be made in the exercise of this power, as against a foreign or domestic judgment? The party seeking relief in a court of equity from a judgment rendered against him must show, and subsequently establish one of four reasons before equity will interfere and grant relief:[1]

1st. He must show that the judgment rendered against him is against equity and good conscience.

2d. That he had no opportunity to make a defense, and that he has a good defense on its merits.

3d. That he was prevented from making his defense by accident or mistake, or by fraud or improper conduct of the opposite party.

4th. That he was without fault on his part.

The mistake to warrant the interposition of equity must be one of fact. Courts will not recognize a mistake of law as a general rule. A mistake of law can usually be corrected by writ of error to an appellate court. A

[1] Carrington v. Holabird, 17 Conn. 537; Norton v. Woods, 5 Paige Ch. 249; Insurance Company v. Hodgson, 7 Cranch, 333; Borland v. Thornton, 12 Cal. 440; Miller v. Morse, 23 Mich. 365: Gray v. Barton, 62 Mich. 186; Crim v. Handley, 94 U. S. 652; Embry v. Palmer, 107 U. S. 11; Brown v. Hurd, 56 Ill. 317; Horn v. Queen, 5 Neb. 472; Robinson v. Wheeler, 51 N. H. 384; Burton v. Wiley, 26 Vt. 432. In Metcalf v. Williams, 104 U. S. 93, it is held that the reasons why a court of equity will give relief are to prevent a party from being deprived of his rights, through circumstances beyond his control, and when the remedy at law is lost or refused.

judgment for a larger sum than is actually due is ground for relief.[2] Equity will also interfere where the mistake is one of fact made by the court.[3] The parties seeking the relief must show that the enforcement and payment of the judgment would be inequitable, or would work an irreparable injury, or would be against good conscience.[4] It must be affirmatively established that the judgment is wrong, and that a similar one is not likely to follow.[5] When a judgment has been obtained without jurisdiction, or without proper service of process, a court of equity should set aside the judgment, *i. e.*: If a court has rendered a judgment upon a false return of the officer, which shows service, when none in fact was made,[6] or if the return of process shows service on the defendant on Saturday, when such service was made on Sunday, the officer having falsified his return,[7] or if the court had assumed jurisdiction, under a statutory provision for constructive service, upon void proceedings, believing them to be regular.[8]

It must be shown by the bill and competent evidence that the defendant has a good defense to the action upon the merits of the case,[9] otherwise relief will be denied. When the defendant was misled or deceived by the plaintiff as to his liability, or as to the fact of the rendition of a judgment or its enforcement against him, or was prevented from obtaining security from a co-defendant by the deceit of the plaintiff, when such co-defendant was solvent, or when delay was caused through the acts or misrepresentations of the plaintiff, so that the defendant could not make a proper defense, by reason of the death or removal of material witnesses, equity has granted relief.[10] When a party is ignorant of the facts which constitute a good defense at law, until judgment is rendered against him, he may have relief in equity.[11] When the proofs show that there was an oral agreement between counsel for the parties, on account of the sickness of one, not to push the case for trial; but subsequently a judgment was obtained without his knowledge, and in his absence, and without any opportunity to put in a defense, the defendant is entitled to equitable relief.[12] When a party, through collusion, suffers a judgment to be obtained against him, and a levy to be made on his property, equity will set it aside, if the court is satisfied that it was done to defraud an honest creditor of such defendant.[13] Equity has granted relief to the sureties on a replevin bond, where the judgment has been rendered against the principal on the bond through the collusion of the plaintiff and defendant, when the purpose of such judgment was to conclude the sureties from making a defense in a subsequent action on the bond, the sureties having been kept ignorant of the original suit and judgment.[14] Courts in equity have refused to give relief where it appeared that the issues would be simply retried in equity,[15] or when the ground of relief is the perjury of witnesses on the trial of the case at law; when such perjury has not been established by judicial determination, or by documentary evidence;[16] or when a party failed to make a

[2] 1 High on Inj. (3d Ed.) § 222; Chase v. Manhardt, 1 Bland. (Tenn.) 333.

[3] Kohn v. Lovett, 43 Ga. 179.

[4] Moore v. Gamble, 1 Stock. Ch. (N. J.) 245; Insurance Co. v. Hodgson, 7 Cranch, 332; Phillips v. Pullen (16 Atl. Rep. 9), 50 N. J. L. 469; Saunder's Appeal, 6 Atl. Rep. 712; Harnish v. Bramer, 71 Cal. 155.

[5] Gregory v. Ford, 14 Cal. 139.

[6] Knowles v. Gas-light Co., 19 Wall. 58; Thompson v. Whitman, 18 Wall. 457-469.

[7] Hausworth v. Sullivan, 9 Pac. Rep. 798, 6 Mont. 203.

[8] Earle v. McVeigh, 91 U. S. 507; Borden v. Fitch, 15 Johns. 141.

[9] Hair v. Lowe, 19 Ala. 224; Pearce v. Olney, 20 Conn. 544; Ableman v. Roth, 12 Wis. 81; White v. Crow, 110 U. S. 183; Kelleher v. Boden, 55 Mich. 295.

[10] Mack v. Doty, Har. Ch. (Mich.) 366; Burpee v. Smith, Walk. Ch. Mich. 327; Roberts v. Miles, 12 Mich. 297. In this case Roberts was indorser of a note, and was prevented from obtaining security from the maker while solvent, through the respresentations of the holder, that he was not liable, as the note had been settled, nor would he be pursued after rendition of judgment, and was not until maker failed. Equity granted a perpetual injunction of the enforcement of the judgment against Roberts. Viele v. Hoag, 24 Vt. 46; Crim v. Handley, 94 U. S. 652. In Rickle v. Dow, 39 Mich. 91, judgment was obtained by misrepresentations upon a note which had been paid. In Wright v. Hake, 38 Mich. 525, a judgment was rendered by collusion between the plaintiff and defendant who was principal on a replevin bond to preclude the sureties. U. S. v. Throckmorton, 98 U. S. 61; Metcalf v. Williams, 104 U. S. 93.

[11] Wales v. Bank, Har. Ch. 308; Lansing v. Eddy, 1 Johns. Ch. 51; Roberts v. Miles, 12 Mich. 297.

[12] Whitcomb v. Gandy, 37 Fed. 735.

[13] Edson v. Cumings, 52 Mich. 52.

[14] Parkhurst v. Summer, 23 Vt. 538; Church v. Barker, 18 N. Y. 466; Lothrop v. Southworth, 5 Mich. 448; Story on Eq. Jur., §§ 700, 702.

[15] Miller v. Morse, 23 Mich. 365; Cottle v. Cole, 20 Iowa, 482.

[16] Gray v. Barton, 62 Mich. 186; Cleveland Iron Min. Co. v. Husby, 72 Mich. 61.

defense which he might have made;[17] or when a party made no defense through his own negligence.[18]

Foreign Judgments.—The same general rules applicable to the right and power of a court of equity to interfere and grant relief against a domestic apply to foreign judgments. But the cases are not so numerous. They are generally called upon to exercise this power when questions of fraud or jurisdiction arise. And the general rule is laid down as follows: Wherever proof is shown that a foreign judgment was obtained without jurisdiction of the person or *res.*, or that its enforcement by an action *in personam* in another State operates as a fraud or an injury upon the just rights of the party seeking relief, equity should interpose its power.[19] One class of cases where the validity of foreign judgments and their enforcement in another State arise is in proceedings by attachment against property of non-residents.[20] Another class of cases where foreign judgments become the subject of attack, is in cases of divorce.[21] A party, however, with full knowledge that such proceedings have been had, or with the means of ascertaining, may be estopped from questioning the validity of such judgment by delay,[22] or when the rights of third parties become involved.[23]

Motion for New Trial: When Res Adjudicata.—When a motion for a new trial has been made and denied by the trial court, such order has been held *res adjudicata*, of the right for a new trial and equity will not grant relief.[24] This rule applies only to an appellate court, or to another court of equal jurisdiction.[25] But it should not be applied where the alleged perjury of witnesses has been clearly established,[26] or when the party is barred at law,[27] or to the court which rendered the judgment if application for relief is seasonably made.[28] An equitable remedy is not lost against a judgment in that court by moving for a new trial, which has been denied.[29]

The time within which to apply in equity as well as in law is during the term of court in which judgment was rendered, if the party asking relief has knowledge of such judgment unless the time is extended, which the trial court has power to do.[30] In Maryland the courts of equity do not recognize this rule, but give relief after the lapse of a term.[31] And the courts of the United States, in the exercise of their equitable powers, refuse to recognize it.[32] In Michigan relief has been granted by motion and in equity after the lapse of a term.[33] In the enforcement of its own judgments a court has the power and the right to control them in any way that will do exact justice--even against its own decrees.[34] A court of equity where it has assumed jurisdiction will retain it, although there may be a remedy at law, and grant the relief prayed.[35] And it also has concurrent jurisdiction in all cases of fraud.[36] It has power to dispose of the whole controversy, and end any further litigation between the parties,[37] and "may go not only

[17] Morris v. Hadley, 9 Mich. 278.

[18] Miller v. Morse, 23 Mich. 365; Wright v. King, Har. Ch. 365; Hampton v. Dudley, 1 J. J. Marsh. 274.

[19] Burton v. Wiley, 26 Vt. 432; Carrington v. Holabird, 17 Conn. 537; Clute v. Potter, 37 Barb. 199; Well's *Res adjud*, § 499; Pearce v. Olney, 20 Conn. 544; Ferguson v. Crawford, 70 N. Y. 253.

[20] Pennoyer v. Neff, 95 U. S. 714, where there is a full discussion of this question.

[21] People v. Dawell, 25 Mich. 247; Sewell v. Sewell, 122 Mass. 156: Doughtery v. Doughtery, 28 N. J. Eq. 581.

[22] Reed v. Reed, 52 Mich. 117; Compo v. Jackson Iron Co., 50 Mich. 598.

[23] Nichols v. Nichols, 25 N. J. Eq. 60.

[24] Kurtz v. Carr, 105 Ind. 574; Donaher v. Prentiss, 22 Wis. 311; Gray v. Barton, 62 Mich. 186; Anderson v. Roberts, 18 John 515, 533; Orcutt v. Orms, 3 Paige, 459; French v. Garner, 7 Ala. 549; Crim v. Handley, 94 U. S. 652.

[25] Holmes v. Steele, 28 N. J. Eq. 173; Bank v. Manufacturing Co., 33 N. J. Eq. 486.

[26] Cleveland Iron Min. Co. v. Husby, 72 Mich. 63.

[27] Nudd v. Ins. Co., 25 Minn. 100; Wingate v. Ferris, 50 Cal. 105.

[28] Phillips v. Negley, 117 U. S. 665; Bronson v. Schulten, 104 U. S. 417; People v. Judge, 20 Mich. 220; Wright v. Hake, 38 Mich. 525.

[29] Metcalf v. Williams, 104 U. S. 93, 96; N. Y. & H. Ry. Co. v. Haws, 56 N. Y. 180. *In re* McCanalgin, 107 Mass. 170. In Wright v. Hake, 38 Mich. 525, to the question that the complainants had lost their remedy in equity by moving for a new trial, the court says: "There is nothing in this. It was very proper for them to get rid of the judgment in that court if they could on any ground that was open to them."

[30] Brooks v. Railway Co., 102 U. S. 107.

[31] Kearney v. Sascer, 37 Md. 264.

[32] Bronson v. Schulten, 104 U. S. 417.

[33] Wright v. Hake, 38 Mich. 525; People v. Judge, 20 Mich. 220.

[34] Story's Eq. Jur., § 64; Montgomery v. Whitworth, 1 Tenn. Ch. 174; Phillips v. Negley, 117 U. S. 665; Blank v. Blank, 107 N. Y. 91.

[35] Tompkins v. Hollister, 60 Mich. 470; Viele v. Hoag, 24 Vt. 51; Rickle v. Dow, 39 Mich. 91.

[36] Adams' Eq. 176; Wyckoff v. Victor Sewing Machine Co., 43 Mich. 309.

[37] Rickle v. Dow, 39 Mich. 91. In Beam v. Macomber,

beyond, but, even contrary to the rules of law" in giving relief.[38] Even where a court of law has heard and denied a motion for a new trial when additional facts are presented or defects in proof supplied, it is usual, particularly in States where there is a code, to grant leave to the party to renew—the motion which has been denied, or to rehear the one which has been granted.[39]

The doctrine that the denial of a motion for a new trial is *res adjudicata*, may be said to be limited in its application. To hold otherwise, would often result in an injury to the party seeking relief, and defeat the right of the court of equity to interpose its power. The recognition of the rule arose, and was held to apply upon the ground that the court in denying a motion for a new trial acted within its discretionary powers, which are not subject to review, and that such court had better means of determining whether the party seeking the relief was entitled to it, than an appellate court. For these reasons the application of the doctrine of *res adjudicata* is limited very properly to such appellate court, or for similar reasons to another court of equal jurisdiction. The foregoing authorities clearly define the rules, and establish the conditions when a court of equity may exercise its power, and grant relief against a judgment at law. This relief is dependent to some extent upon the facts of each particular case, known best to the trial court. These facts are addressed to the good conscience of the court, and should receive careful consideration. This relief should be granted wherever justice may be done, and the rights of the parties seeking it protected and preserved. But it should not be for delay, nor to prolong litigation, nor to harass the weaker party.

GEORGE P. VOORHEIS.

Toledo, Ohio.

[38] Mich. 127, an award was set aside on the ground of a mistake and deceit of one party, and such party perpetually enjoined. Wallace v. Wallace, 63 Mich. 326.

[38] 1 Story's Eq. Jur., §§ 252, 254; Garth v. Cotton, 3 Atk. 755.

[39] Smith v. Spalding, 3 Robertson, N. Y. 615; Belmont v. Erie Ry. Co., 52 Barb. 637, and authorities cited.

MALICIOUS PROSECUTION — PROBABLE CAUSE.

ROSS V. HIXON.

Supreme Court of Kansas, June 6, 1891.

The finding of an examining magistrate that "an offense had been committed, and that there was probable cause to believe the defendant guilty thereof," is only *prima facie* evidence of probable cause, in an action for malicious prosecution brought by such defendant against the prosecuting witness.

SIMPSON, C.: On the 17th day of January, 1887, Hixon filed an affidavit before a justice of the peace in Bourbon county, charging Ross with having mixed certain poison with a quantity of flour, with the intent and for the purpose of causing the death of certain persons. Upon said complaint a warrant was issued, and Ross was arrested. A preliminary trial was had on the 4th of February before the justice who issued the warrant. At the preliminary examination twelve witnesses were examined for the State, and seven for the defendant. After the hearing of all the evidence, the justice bound Ross to appear at the district court and answer the charge. He failed to give bond, and was committed to jail. The finding of the justice was as follows: "After hearing the evidence, I find that said offense has been committed, and that there is probable cause to believe the defendant guilty thereof." Ross was in jail from the 17th day of January, 1887, until May 2, 1887. On the latter date, the district court of Bourbon county being in session, the county attorney filed a statement showing cause for non-prosecution, and Ross was discharged. On the 8th day of August, 1887, he commenced this action for malicious prosecution against James Hixon, the prosecuting witness. Trial was had at the May term, 1888. The plaintiff in error offered evidence showing the proceedings before the justice of the peace on the criminal charge, and tending to prove every material allegation in such an action. When the plaintiff rested, the defendant Hixon introduced a large number of witnesses, when he was interrupted by the court. The trial was stopped, and a verdict was ordered for the defendant. The jury returned a verdict for the defendant, and a motion for a new trial was overruled. The record itself discloses no reason for the ruling of the court, but counsel agreed that the reason assigned by the trial court was that the examining magistrate had made a finding of probable cause, and that such finding was conclusive upon that question. It is further claimed by counsel for the defendant in error that the trial court made the further statement: "That, as the petition does not charge fraud or undue means in obtaining the finding of probable cause by the magistrate, the same cannot be attacked." The sole question discussed in the oral argument of counsel for defendant in error, and the briefs on both sides, is as to the weight to be given to the finding of the

examining magistrate as to whether it is *prima facie* or conclusive on the question of probable cause, and whether or not, in either case, the finding must be attacked for fraud or undue means by proper allegations in the petition.

1. In the case of Sweeney v. Perney, 40 Kan. 102, 19 Pac. Rep. 328, this court incidentally noticed the conflict in authorities as to whether or not proof of arrest, committal and indictment is *prima facie* proof of probable cause; and the case of Ricord v. Railroad Co., 15 Nev. 167, was cited on one side, and that of Womack v. Circle, 29 Gratt. 192, on the other. The question in this case is closely allied to this controversy, but authorities cannot be found on both sides of this question. In the case of Bauer v. Clay, 8 Kan. 585, Justice Valentine says: "The proof showing that the justice ordered that Clay should be bound over for his appearance at court, or, in default of bail, that he should be committed to the county jail, is only *prima facie*, and not conclusive evidence of probable cause." The cases of Ash v. Marlow, 20 Ohio, 119, and Ewing v. Sanford, 19 Ala. 605, are cited in support. The force of this decision is sought to be destroyed by counsel for defendant in error by an assertion that it is *dictum*. It is sometimes difficult to draw the line between what is authoritative and what is not in a judicial opinion. The report of the case does not give either the pleadings, the assignment of errors, or the briefs, but it is evident that the question was necessarily involved in the rulings of the trial court; and this court thought it necessary to give this as one of the reasons for affirmance of the judgment below, because, if counsel for defendant in error are now right in their contention, Clay had no cause of action, and the case was decided wrongfully in both the trial and the appellate courts. However the rule may be in cases in which the magistrates have jurisdiction to hear and pass judgment, we are satisfied that the case of Bauer v. Clay states the true rule in cases in which the magistrates have only power to bind over. This rule is upheld by the cases of Ash v. Marlow, 20 Ohio, 119; Ewing v. Sanford, 19 Ala. 605; Raleigh v. Cook, 60 Tex. 438; Ricord v. Railroad Co., 15 Nev. 167; Hale v. Boylen, 22 W. Va. 234; Bacon v. Towne, 4 Cush. 217; Spalding v. Lowe, 56 Mich. 366, 23 N. W. Rep. 46; Ganea v. Railroad Co., 51 Cal. 140; Diemer v. Herber, 75 Cal. 287, 17 Pac. Rep. 205. These are all express adjudications on that particular question. In one of these cases, decided in 1885, being that of Spalding v. Lowe, 56 Mich. 366, 23 N. W. Rep. 46, the defendant requested the trial court to instruct the jury as follows: "It appears from the proofs in this case that an examination was had upon the charge made against Spalding, and that the justice upon such examination determined that this offense charged against Spalding had been committed, and that there was probable cause to believe said Spalding guilty thereof. This was a judicial determination the justice was authorized to make, and unless such action and determination of the justice was corrupt or collusive, or was wrongfully procured by the defendant herein, it is final as to the question of probable cause, and your verdict should be for the defendant." The trial court refused to so instruct the jury, and this refusal was assigned as error in the supreme court, but that court say (page 372, 56 Mich., and page 49, 23 N. W. Rep.): "No authority has been produced in support of it, and we think none exists." We have been unable to find a reported case in which the rule is held as claimed by counsel for defendant in error. There are cases that so hold when the magistrate has power to render a judgment of conviction. How much weight as proof of probable cause shall be attributed to the judgment of a court in an original action, when subsequently reversed for error, is elaborately discussed by the Supreme Court of the United States in the case of Crescent City Live Stock Co. v. Butchers' Union, etc. Co., 120 U. S. 141, 7 Sup. Ct. Rep. 472—a case much relied on by counsel for defendant in error. To our mind, however, the distinction between that case and the one at bar is plain and distinct. If the magistrate in Bourbon county had possessed the statutory power to hear the evidence and determine the guilt or innocence of the defendant, and to punish by fine and imprisonment if guilt was found, then his finding and judgment would come within the rule established by that case to be the law of the land. The question in this case is how much weight, as proof of probable cause, shall be attributed to the finding of an examining magistrate that "an offense had been committed, and that there is probable cause to believe the defendant guilty thereof," when the defendant is subsequently discharged, the prosecution against him confessedly ended, and he has instituted a suit for malicious prosecution against the complaining witness. In the one case there is a solemn judgment rendered by a court having full and complete jurisdiction both of the parties and subject-matter, binding on all until reversed on appeal or error. In the other case there is a finding, in effect, that sufficient facts have been developed that justifies a magistrate in sending the parties before a court competent to ultimately deal with the question of guilt or innocence. Again, while a conviction is generally conclusive of probable cause, yet it may be overcome by a showing that it was procured by fraud, undue means or the false testimony of the prosecution. Womack v. Circle, 29 Gratt. 192; Olson v. Neal, 63 Iowa, 214, 18 N. W. Rep. 863; Cloon v. Gerry, 13 Gray, 201; Whitney v. Peckham, 15 Mass. 243; Peck v. Chouteau, 91 Mo. 138, 3 S. W. Rep. 577; Bowman v. Brown, 52 Iowa, 437, 3 N. W. Rep. 609; Palmer v. Avery, 41 Barb. 290; Richey v. McBean, 17 Ill. 63; Payson v. Caswell, 22 Me. 212; Herman v. Brookerhoff, 8 Watts, 240; Jones v. Kirksey, 10 Ala. 839. In such a case the petition in the action for malicious prosecution must directly attack the judgment of conviction, or it will be suicidal. It is therefore unimportant

whether the words used by the court in Bauer v. Clay are *dicta* or authoritative in that case, as they express the law as universally held by all courts of last resort that have spoken on this subject. It follows that the other suggestion of counsel, that the finding of the magistrate must be directly attacked in the petition for fraud or undue means, is without force; because, as that finding is only *prima facie*, all that is necessary for the plaintiff to do to win is to overthrow it by a preponderance of evidence. It can be fairly said that there was evidence submitted at the trial by the plaintiff in error, other than the transcript of the proceedings before the examining magistrate, bearing upon the question of probable cause, which the court below permitted to go to the jury, from which they might have found that the *prima facie* case made by the magistrate's finding was overcome. It is recommended that the judgment of the district court of Bourbon county be reversed, and the cause remanded, with instructions to grant a new trial.

PER CURIAM. It is so ordered; all the justices concurring.

NOTE.—The rule is that an action for malicious prosecution will not lie until the proceeding complained of has been terminated in favor of the defendant therein: Hamilton v. Shepard, 119 Mass. 30; Stewart v. Sonneborn, 98 U. S. 187; Hatch v. Cohen, 84 N. C. 602; Apgar v. Woolston, 43 N. J. L. 57; Casebar v. Drahoble, 13 Neb. 465; Gorrell v. Snow, 31 Ind. 215; Hall v. Fisher, 20 Barb. 441; Glasgow v. Owen, 59 Tex. 167. A discharge on *habeas corpus* is sufficient: Walker v. Martin, 43 Ill. 508; Zebley v. Storey, 117 Pa. St. 417; but if the action has been appealed, the appeal must first be determined: Nebenzohl v. Townsend, 61 How. Pr. 353; Reynolds v. DeGreer, 13 Ill. App. 113. This fact must be averred in the complaint. Severence v. Judkins, 73 Me. 376; Woodworth v. Mills, 61 Wis. 44; Rhoadadeck v. Blair Town Lot and Land Co., 62 Iowa, 368; Merriman v. Morgan, 7 Oreg. 68; Lawler v. Levy, 33 La. Ann. 221; with allegation as to how it was ended: Teague v. Wilkes, 3 McCord, 461; but a verdict will cure such omissions in the pleadings: Cardinal v. Smith, 109 Mass. 158. Malice and probable cause being other requisites to the maintenance of this action, must be averred in the complaint: Hahn v. Schmidt, 64 Cal. 284; Thaule v. Kreckeler, 81 N. Y. Y. 428; Fagan v. Knox, 66 N. Y. 525; Thompson v. Lumley, 50 How. (U. S.) 50; Hogg v. Pickney, 16 S. C. 387; Turner v. Turner, 85 Tenn. 287; Moody v. Deutsch, 85 Mo. 237; Schotten v. Longfellow, 40 Ind. 23.

The malice necessary to sustain an action of this kind is not express malice, that is, the plaintiff need not show that the defendant was actuated by malevolence or a corrupt design, but only that the proceeding was instituted from an improper or wrongful motive: Johnson v. Ebberts, 11 Fed. Rep. 129; Page v. Cushing, 38 Me. 523; Frowman v. Smith, Litt. Sel. Cas. 7; Harpham v. Whitney, 77 Ill. 32; Barron v. Mason, 31 Vt. 189; and malice is not to be presumed from want of probable cause. It must be found by the jury as a substantial fact in the case: Center v. Spring, 2 Clarke, 393; Johnson v. Ebberts, *supra;* Stewart v, Sonneborn, 98 U. S. 191; Bartlett v. Hawley, 37 N. W. Rep. 580; Munns v. Dupont, 3 Wash. C. C. 31; Wheeler v. Nesbitt, 24 How. 551: Vinal v. Core, 18 W. Va. 1; Long v. Brannan, 39 Cal. 448. But on this point, see Southwest Railroad Company v. Mitchell, 80 Ga. 438. On a criminal trial for a malicious prosecution malice must appear, although the statute does not expressly so declare: Dempsey v. State, 27 Tex. App. 269. The rule that to sustain an action for malicious prosecution, both malice and want of probable cause must be shown, and that malice may be inferred from want of probable cause, was applied in Steed v. Knowles, 79 Ala. 446; Frame v. Sewing Machine Co., 81 Fed. Rep. 704; Jordan v. Atlantic R. Co., 81 Ala. 220; Porter v. White, 5 Mack, 180. These two elements should concur: Castro v. DeUriarte, 16 Fed. Rep. 93; Yocum v. Polley, 1 B. Mon. 358; Carleton v. Taylor, 50 Vt. 220; Smith v. Zent, 59 Ind. 362; McKown v. Hunter, 30 N. Y. 625; Evans v. Thompson, 12 Heisk. 534; Fagnan v. Knox, 66 N. Y. 525. The malice in fact that the plaintiff is required to prove, is found by the jury from all the evidence in the case: Glasgow v. Owen, 69 Tex. 167. The proof of any act done willfully and purposely to the prejudice and injury of another, which is unlawful, is, as against that person, a malicious act: Com. v. Snelling, 15 Pick. 337; Mitchell v. Wallace, 111 Mass. 492; Pullen v. Glidden, 66 Me. 202; Wills v. Noyes, 12 Pick. 324; Humphries v. Parker, 52 Me. 502. The law will not presume malice merely from an unfounded prosecution: Dietz v. Langfitt, 63 Pa. St. 234; or from the acquittal of the plaintiff: Gerrard v. Willet, 4 J. J. Marsh. 628; or from a discharge by *nolle prosequi:* Yocum v. Polly, 1 B. Mon. 358. Malice is never an inference of law: Gee v. Culver, 6 Pac. Rep. 775; but it is frequently found by the jury as a deduction of fact from want of probable cause: Edgeworth v. Carson, 5 N. W. Rep. 282; Green v. Cochran, 43 Iowa, 545; Heap v. Parish, 3 N. E. Rep. 123; Flickinger v. Wagner, 46 Md. 681; Bell v. Graham, 1 Nott & McC. 278; Turner v. O'Brien, 5 Neb. 542; Burnhaus v. Sanford, 19 Wend. 417; Levy v. Brannan, 30 Cal. 485. And in Murphy v. Hobbs, 5 Pac. Rep. 119, it was held that a criminal intent would be supplied where the wrong and injury result from the lack on the part of the defendant of that ordinary prudence and discretion which persons of sufficient age and sound mind are presumed to have. See also Walker v. Camp, 19 N. W. Rep. 802. The court held in Bruington v. Wingate, 7 N. W. Rep. 478, where the defendant maliciously and without probable cause had the plaintiff arrested for petit larceny, that the hostility of the defendant prior to the prosecution might be shown to the jury to enable them to determine the malice of the defendant in beginning the prosecution. And malice will be inferred if the object of the prosecution is other than that of bringing the party to justice: Paddock v. Watts, 116 Ind. 146; Rose v. Langworthy, 14 N. W. Rep. 515; Johns v. Marsh, 9 Reporter, 143; Mitchell v. Jenkins, 5 Barn. & Adol. 594. This action will lie against one who causes the arrest of another for the purpose of ascertaining who perpetrated an offense: Johnson v. Ebberts, 11 Fed. Rep. 129.

The existence of such facts and circumstances as would arouse the belief in a reasonable mind, acting on the facts within the knowledge of the prosecutor, that the accused was guilty of the crime for which he was prosecuted, constitute probable cause: Heyne v. Blair, 62 N. Y. 19; Brewer v. Jacobs, 22 Fed. Rep. 217; Ames v. Snider, 69 Ill. 376; McGown v. Brackett, 33 Me. 331; Walker v. Camp, 63 Iowa, 627; Bacon v. Towne, 4 Cush. 217; Wheeler v. Nesbitt, 24 How. (U. S.) 544; Barron v. Mason, 31 Vt. 189; Sharpe v. Johnson, 76 Mo. 660; Boyd v. Cross, 35 Md. 197; Cooper v. Utterbach, 39 Md. 232; Shafer v. Loucks, 58 Barb. (N.

Y.) 426; Hays v. Blizzard, 30 Ind. 457; Glasgow v. Owen, 69 Tex. 157; Morey v. Whipple, 8 R. I. 360; Paddock v. Watts, 116 Ind. 146. The question is not whether the offense has in fact been committed, or whether the accused is guilty or innocent, but upon the prosecutor's belief based upon rational grounds of suspicion, supported by circumstances sufficient to warrant belief by a cautious mind: Bacon v. Towne, *supra;* Faynan v. Knox, 66 N. Y. 525; Davis v. Wisher, 72 Ill. 262. If there is an honest belief of guilt based upon reasonable grounds the party will be justified, although the accused shows himself to be innocent of the offense: Brand v. Hinchman, 68 Mich. 590; Carl v. Ayers, 53 N. Y. 17. But the prosecutor cannot justify a prosecution by presenting circumstances which make a *prima facie* case, if he had, in fact, knowledge of facts which explained the suspicious appearance and exonerated the accused from the charge preferred against him: Woodworth v. Mills, 61 Wis. 44; Plummer v. Johnson, 35 N. W. Rep. 444. Nor does probable cause depend upon mere belief, however sincerely entertained, for one may believe on suspicion and suspect without cause: Farman v. Feeley, 56 N. Y. 451; Collins v. Hayte, 50 Ill. 353. What is required is that he act as a reasonable and prudent man would be likely to act under like circumstances: Casey v. Sevatson, 16 N. W. Rep. 400; Bourne v. Stout, 62 Ill. 261; Carter v. Southerland, 52 Mich. 597; Cole v. Curtis, 16 Minn. 182; Wilson v. Bowen, 31 N. W. Rep. 81. Mere suspicions, without reasonable ground for believing them to be founded in fact, are not sufficient: Hirsch v. Teeney, 83 Ill. 548. Neither does the question depend upon the guilt or innocence of the party, but upon the prosecutor's belief in it at the time of prosecution, upon reasonable grounds: King v. Colvin, 11 R. I. 582; Forbay v. Ferguson, 2 Denio, 617; Jacks v. Stimpson, 13 Ill. 701; Swain v. Stafford, 3 Ired. 289; Raulston v. Jackson, 1 Sneed, 128. And certain persons having stated to the defendant that they believed that the plaintiff had committed a crime does not justify a prosecution therefor: Norrell v. Vogel, 39 Minn. 107.

Probable cause or a want thereof is a question of law, and not one of fact for the jury. But when the facts on which the probable cause is founded are in dispute, they must be submitted to the jury: Bell v. Keepers, 37 Kan. 64. See also Donnelly v. Daggett, 145 Mass. 314. Whether there is sufficient evidence of a want of probable cause to sustain the burden of proof, which is on the plaintiff, is also a question of law for the court.

The want of probable cause must be established by the plaintiff; it will not be inferred from malice proved: Wheeler v. Nesbitt, 24 How. 544; Dwain v. Ducalso, 5 Pac. Rep. 903.

When probable cause is found to exist the defendant is entitled to a verdict, irrespective of the question of malice: Hamilton v. Smith, 39 Mich. 222; Thompson v. Beacon Valley Rubber Co., 56 Conn. 493; Smith v. Austin, 13 N. W. Rep. 593.

The advice of counsel does not necessarily shield one against a charge of malicious prosecution. It is no defense if it appears that the defendant did not himself believe that the accused was guilty: Vann v. McCreary, 77 Cal. 434; or unless the facts acted upon are fully and correctly stated to counsel, and there is nothing to show lack of good faith: Cuthbert v. Gallowa, 35 Fed. Rep. 466; Mesher v. Iddings, 72 Iowa, 553; Beidler v. Beirnaert, 25 Ill. App. 422. But when the prosecutor has fairly submitted to counsel all the facts in the case known to him, or which by proper diligence could have been ascertained and are capable of proof, and is advised that they are sufficient to sustain a prosecution, and acting in good faith upon such opinion, does prosecute, he cannot be held liable in an action for malicious prosecution, although the legal opinion given to him is erroneous: Donnelly v. Burkett, 34 N. W. Rep. 330; Stud v. Knowles, 76 Ala. 446; Motes v. Bates, 80 Ala. 382; St. Johnsbury R. Co. v. Hunt, 59 Vt. 294; Jones v. Jones, 71 Cal. 89; Moore v. Northern Pacific R. Co., 37 Minn. 147; Walter v. Sample, 25 Pa. St. 275; Wicker v. Hotchkiss, 62 Ill. 107; Hill v. Palm, 38 Mo. 13; Anderson v. Friend, 71 Ill. 475; Eastman v. Keasor, 44 N. H. 519. In Brewer v. Jacobs, the court said that the advice of counsel in such cases is referable rather to the issue of malice than the want of probable cause, and therefore it will afford no protection if the jury can see, from the facts that the suit was malicious.

The defendant may testify that in stating the case on which the prosecution was founded, to counsel, he withheld nothing: Donnelly v. Burkett, *supra;* and whether taking such advice shall be a complete defense is a question for the jury: Fadner v. Filer, 27 Ill. App. 506.

The rule now generally accepted is that the finding of the examining magistrate or the ignoring of a bill by the grand jury is not conclusive as to probable cause: Spaulding v. Lowe, 23 N. W. Rep. 46. But dismissing an action voluntarily is *prima facie* evidence of want of probable cause: Burhous v. Sandford, 19 Wend. 417; Wetmore v. Mellinger, 14 N. W. Rep. 722; Green v. Cochran, 43 Iowa, 444. Like weight will be given to the finding of a "true bill" of indictment by a grand jury: Johnson v. Miller, 17 N. W. Rep. 34. This is true, although the prosecution may have resulted in an acquittal. The authorities are not unanimous as to whether a conviction before a justice of the peace is conclusive evidence of probable cause: Whitney v. Peckham, 15 Mass. 243; Iowa v. Johnson, 17 N. W. Rep. 34; Burt v. Place, 4 Wend. 591; Witham v. Gowen, 14 Me. 362. But it is generally held that the judgment of a court of competent jurisdiction in favor of the prosecution, even though subsequently reversed on appeal, is sufficient evidence of probable cause, unless contradicted by proof that it was procured by fraud: Olson v. Neal, 18 N. W. Rep. 863; Bowman v. Brown, 3 N. W. Rep. 609; Crescent City, etc. v. Butcher's Union, 7 S. C. Rep. 472.

RECENT PUBLICATIONS.

BOOKS RECEIVED.

A TREATISE ON THE MEASURE OF DAMAGES; or, An Inquiry into the Principles which Govern the Amount of Pecuniary Compensation Awarded by Courts of Justice. By Theodore Sedgwick, Author of "A Treatise on Statutory and Constitutional Law." Eighth Edition. Revised, Rearranged and Enlarged by Arthur G. Sedgwick and Joseph H. Beale, Jr. Vols. I., II. and III. New York: Baker, Voorhis & Co., Law Publishers, 66 Nassau street. 1891.

QUERIES.

QUERY NO. 2.

An indictment charged "that A B, on the 1st day of June, 1891, and continuously from thence to the filing

of this presentment, did," etc. Question: Can the State go back of June 1st (statutory limitation being two years) and show acts that would establish the defendant's guilt, or is the prosecution limited to the time elected in the indictment? Legal opinion here is divided on the question.

HUMORS OF THE LAW.

A couple of lawyers engaged in a case were recently discussing the issue.

"At all events," said the younger and more enthusiastic, "we have justice on our side."

To which the older and warier replied, "Quite true; but what we want is the Chief-Justice on our side."

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

1. APPEALABLE ORDER—Injunction.—An appeal will not lie from an order overruling a motion to dissolve a preliminary injunction and to vacate an order appointing a receiver, in a suit for the dissolution of a partnership and for an accounting.—*Basche v. Pringle*, Oreg., 26 Pac. Rep. 863.

2. ATTACHMENT—Absence from County.—Code Tenn. § 3466, provides that, in any civil action, when the summons has been returned, "Not to be found in my county," as to any defendant resident of the county, the plaintiff, at his election, may sue out an attachment against such defendant's estate. *Held*, that absence from the county for only two days on a visit, and not for the purpose of evading service, will not justify a return of "Not to be found," and an attachment issued upon such return will be dissolved.—*Robson v. Hunter*, Tenn., 16 S. W. Rep. 465.

3. BANKS AND BANKING — Usury. — Where plaintiff charged 1 per cent. per month on overdrafts, and defendant gave notes for the debt balance, to run at 10 per cent. per annum, not knowing of the charge of interest on the overdrafts, there is not such a usurious contract running in the notes as to declare a forfeiture under the Iowa laws.—*First Nat. Bank v. Moore*, Iowa, 48 N. W. Rep. 1072.

4. CARRIERS—Passengers—Negligence.—A boy 12 years old was thrown from a street-car and injured. He was standing on the step of the front platform, and testified that he was thrown from the car by a sudden jolt after the driver had put his team into a rapid run. *Held*, that it was error to charge that it was not negligence in itself for the boy to stand on the step of the platform, and the error was not cured by another instruction which submitted the question to the jury.—*Willmott v. Corrigan Consolidated St. Ry. Co.*, Mo., 16 S. W. Rep. 500.

5. CARRIERS—Passengers — Negligence.—In an action by a passenger against a railroad company for injury received by the falling of a berth while she was away from her seat and standing by the stove, it is not necessary for her to allege and prove necessity for her absence from her seat, contributory negligence being a matter of defense.—*Northern Pac. R. Co. v. Hess*, Wash., 26 Pac. Rep. 866.

6. CARRIERS OF GOODS—Bill of Lading.—In an action against a railroad company for damages for the loss of one of five barrels of whisky consigned to plaintiff, the bill of lading which was signed neither by the consignor nor consignee, provided in a foot-note that "claims for loss or damage must be presented to the delivering line within 36 hours after the arrival of the freight." *Held*, that this provision would be applicable to freight which in fact was never delivered, and that it must be regarded as waived by a promise of defendant's agent, made when the four barrels were delivered, that the missing barrel should be found and delivered in a few days.—*Galveston, H. & A. R. Co. v. Ball*, Tex., 16 S. W. Rep. 441.

7. CARRIERS OF PASSENGERS — Safe Appliances. — Where, in a suit against a street-railway company, for personal injuries, plaintiff claims that he was thrown by the premature start of the car as he was getting off, and that his foot was caught in a hole in the step, so that he was dragged, while defendant contends that plaintiff tried to get off the car while it was in motion, and it is shown that the aperture in which plaintiff's foot was caught exists on all such cars, and is not unsafe, it is error to submit to the jury the question whether defendant was negligent in adopting that style of step, as the only question is whether the car started prematurely or not.—*Werbowisky v. Ft. Wayne & E. Ry. Co.*, Mich., 48 N. W. Rep. 1097.

8. CARRIERS OF PASSENGERS—Trespasser.—Although plaintiff got on a train knowing that no passengers were allowed on it, and though it was the duty of the brakeman to put him off, still if the latter, in the discharge of that duty, willfully assaulted and beat plaintiff, merely because he declined to get of while it was running at a rate of speed rendering the attempt hazardous, the company would be liable for punitive damages.—*Ala. & G. S. R. Co. v. Frazier*, Ala., 9 South. Rep. 303.

89. CONSTITUTIONAL LAW.—The unconstitutionality of a statute must be established beyond a reasonable doubt. It is not enough to show that the act is obnoxious to some unexpressed intent or spirit supposed to pervade the constitution. The constitution operates upon the legislature purely as a limitation; that body possesses plenary authority, except as expressly or by clear implication denied in the constitution.—*People v. Richmond*, Colo., 26 Pac. Rep. 929.

10. CONTEMPT—Order of Arrest.—It is error to issue an attachment, warrant, or order of arrest for an alleged constructive contempt, without an affidavit or information containing a statement of the facts, constituting the alleged contempt, having first been filed with the court.—*State v. Henthorn*, Kan., 26 Pac. Rep. 937.

11. CONTEMPT—Punishment.—Where the trial court has fined an attorney for contempt in using disrespectful language, it has no authority to further order that he shall purge himself of the contempt by apologizing; and *mandamus* will lie to compel the vacation of an order denying him the right to practice until he does so

apologize, the fine having been duly paid.—*State v. Sachs*, Wash., 26 Pac. Rep. 865.

12. CONTRACTS—Consideration.—The grocers in a certain town agreed with a firm which was about to open a butter store that they would not buy any butter for the term of two years. Said firm paid nothing to the grocers, nor did it buy out any established business. *Held*, that the contract was void for want of consideration, and in restraint of trade.—*Chaplin v. Brown*, Iowa, 48 N. W. Rep. 1074.

13. CONTRACTS—Damages.—The plaintiff agreed to put up a saw-mill on a certain lot, and to manufacture for the defendant all the timber owned by the defendant on that lot and on an adjoining one. The plaintiff put up the saw mill, but was stopped by writs of ejectment and estopment as to one of the lots, and by a writ of ejectment as to the other. In each case a recovery was had under a title adverse to the defendant. *Held*, that the plaintiff was entitled to recover the damage sustained by reason of his preparations to perform the contract.—*Rogers v. Davidson*, Penn., 21 Atl. Rep. 1083.

14. CONTRACT OF SALE—Novation.—Plaintiff sold defendant wine at a certain price, a written contract of sale being signed in duplicate. By mutual mistake, one copy recited a less price than that agreed, and this copy was assigned by defendant to a third party, to whom, by defendant's direction, the wine was delivered. *Held* that, in the absence of evidence showing a release of defendant and an acceptance of his assignee, there was no novation of parties, even though plaintiff may have known of the assignment, and received partial payments from the assignee.—*Haubert v. Mausshardt*, Cal., 26 Pac. Rep. 899.

15. CORPORATION—Service of Process.—In an action against a non-resident co operative assessment insurance organization, not authorized to do business in Michigan, service of process on an agent of defendant, who at the time service was made was acting as agent in receiving payment of assessments and giving receipts of the company therefor, is sufficient.—*Voorheis v. People's Mut. Ben. Soc.*, Mich., 48 N. W. Rep. 1087.

16. CORPORATION—Stockholder.—A stockholder in a corporation may sue both at law and in equity in his own name in behalf of its interest and to vindicate a wrong done to it, when it cannot or will not do so in its corporate capacity; and under like circumstances a stockholder may defend in his own name an action brought against a corporation.—*Morrill v. Little Falls Manuf'g Co.*, Minn., 48 N. W. Rep. 1124.

17. CRIMINAL LAW—Assault with Intent to Kill.—Under Rev. St. 1879, § 1262, making the stabbing of another with an intent to kill an offense punishable with imprisonment in the penitentiary, an indictment therefor is not insufficient because it fails to charge that the knife with which the stabbing is alleged to have been done is a deadly weapon, or that it was open in the hand of the defendant when the stabbing was done.—*State v. Keele*, Mo., 16 S. W. Rep. 509.

18. CRIMINAL LAW—Homicide—Self-defense.—A person cannot arm himself with a deadly weapon, with the intention of using it to overcome his adversary, if necessary, and, so armed, go upon his premises, and provoke a difficulty with him, and slay him, and afterwards be heard to say that he acted in self-defense.—*Thompson v. State*, Miss., 9 South. Rep. 298.

19. CRIMINAL LAW—Manslaughter.—Where defendant is carelessly handling a loaded shotgun, and without examining to see whether it is loaded, points it at another, and shoots him, inflicting a wound from which he dies, though the shooting was not intentionally done by defendant, but is the result of his negligence in handling the gun, and of a recklessness and carelessness on his part incompatible with a proper regard for human life, he is guilty of manslaughter in the fourth degree, under the laws of Missouri.—*State v. Morrison*, Mo., 16 S. W. Rep. 492.

20. CRIMINAL LAW—Second Conviction.—Pen. Code Cal. § 461, declares that burglary in the second degree is punishable by imprisonment in the State-prison for not more than five years, and section 666 provides, among other things, that one twice convicted of felony may be punished by 10 years' imprisonment therein. *Held* that, where an indictment charged three former convictions, and these were admitted of record, a judgment reciting a conviction of burglary in the second, and affixing a sentence of 10 years, was valid, without reciting the former convictions.—*Ex parte Williams*, Cal., 26 Pac. Rep. 887.

21. CRIMINAL LAW—Seduction.—Rev. St. Mo. 1879, § 1912, provides that, in trials for seduction under promise of marriage, the evidence of the woman as to such promise must be corroborated. *Held* that, though evidence of circumstances which usually accompany the engagement are sufficient supporting evidence, the existence of such circumstances must be shown by other testimony than that of the woman herself.—*State v. McCaskey*, Mo., 16 S. W. Rep. 511.

22. CRIMINAL PRACTICE—Amendment of Indictment.—Under Code Crim. Proc. Tex. art. 420, subd. 2, providing that an indictment must show that it was presented in the district court of the county in which the grand jury was in session, the failure to show such presentment is one of form only, and may be cured by amendment.—*Murphey v. State*, Tex., 16 S. W. Rep. 417.

23. CRIMINAL PRACTICE — Indictment.— The use of the character "&" for the word "and" in the phrase "against the peace and dignity of the State" in an indictment, does not vitiate the indictment.—*Molton v. State*, Tex., 16 S. W. Rep. 423.

24. DEATH BY WRONGFUL ACT—Conflict of Laws.—A resident of Missouri was killed by a train in Kansas, under such circumstances that, had the accident occurred in Missouri, his wife could have recovered from the railroad company the forfeiture of $5,000 imposed by the second section of the damage act of that State. The Kansas statute provides that, "when the death of one is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor." "The damages cannot exceed $10,000, and must inure to the exclusive benefit of the widow and children, if any, or next of kin, to be distributed in the same manner as personal property of the deceased:" *Held*, that the wife could not recover, in an action in Missouri, though no administrator could be appointed in Kansas, because the deceased left no estate there, and though no action under the Kansas statute could be brought in either State by an administrator appointed in Missouri.—*Oates v. Union Pac. Ry. Co.*, Mo., 16 S. W. Rep. 487.

25. DEDICATION OF LAND—Railroad Company.—A common-law dedication of land cannot be made to a railroad company for public use for railroad purposes.—*Watson v. Chicago M. & St. P. Ry. Co.*, Minn., 48 N. W. Rep. 1129.

26. DIVORCE—Disposition of Property.—Under Code Wash. § 2007, providing that, "in granting a divorce, the court shall also make such disposition of the property of the parties as shall appear just and equitable, having regard to the merits of the parties, their condition after divorce, and to the party through whom the property was acquired," the court has power to dispose of the separate, as well as the joint, property of husband and wife.—*Webster v. Webster*, Wash., 26 Pac. Rep. 864.

27. EJECTMENT—Conflicting Instructions.—In ejectment, where the defense is that plaintiffs' ancestor conveyed the premises to defendants' grantor by a deed which plaintiffs claim was forged, it is error to instruct that a forged deed is void, and confers no rights, "except, if duly recorded, it is constructive notice of that fact."—*Haight v. Vallet*, Cal., 26 Pac. Rep. 897.

28. EJECTMENT — Evidence — Map.—In an action of ejectment, a map or diagram of the premises in controversy, made by a competent surveyor who had surveyed the premises, is competent evidence. It is explanatory of the survey of the premises.—*Rowland v. McCown*, Oreg., 26 Pac. Rep. 853.

29. ELECTIONS—Constitutional Law.—Const. Tenn. art. 4, § 1, provides that every male citizen of the United States of the age of 21 years, * * * shall be entitled to vote, and there shall be no qualification attached to the right of suffrage, except that each voter must have paid his poll-tax. *Held*, that Act Tenn. March 11, 1890, providing for a system of elections whereby the names of all the candidates are printed upon one ticket, and each voter is compelled to mark a cross opposite the name of each candidate for whom he wishes to vote, is not unconstitutional, as requiring an educational qualification.—*Cook v. State*, Tenn., 16 S. W. Rep. 471.

30. ELECTIONS—Mandamus.—Const. Mo. art. 8, § 3, provides that in all cases of contested elections the ballots may be recounted, and Rev. St. § 4710, provides that the court trying such contest shall determine it in a summary manner, without any formal pleading, at the first term that shall be held 15 days after the official counting of the votes. *Held*, that such relief is adequate and speedy, and that, where such contest is pending by a candidate for the office of prosecuting attorney, *mandamus* will not lie to compel the clerk of the county court to issue to him a certificate of election to such office.—*State v. Smith*, Mo., 16 S. W. Rep. 503.

31. EMINENT DOMAIN—Jury Trial.—In a proceeding taken by the government under Act. Cong. Aug. 18, 1890, to condemn lands to the use of the United States, the owner of the land is not entitled as a matter of right to a trial by jury.—*United States v. Engerman*, U. S. D. C. (N. Y.), 46 Fed. Rep. 176.

32. EQUITY—Jurisdiction—Deed.—Where a bill alleges the execution and delivery of a deed of real estate, and that the grantor subsequently got possession of it and destroyed it, and prays for a decree supplying it, a court of equity will take jurisdiction, notwithstanding the property conveyed is located in another State.—*King v. Pillow*, Tenn., 16 S. W. Rep. 469.

33. EVIDENCE—Record of Private Corporation.—Before a party can give secondary evidence of the contents of the records of a private corporation, he must show that he cannot produce the original in a reasonable time, and with reasonable diligence.—*Bowick v. Miller*, Oreg., 26 Pac. Rep. 861.

34. EXEMPTIONS.—A debtor was engaged in selling oil, most of the sales being made from a tank wagon which he used in delivering oil. The wagon was driven sometimes by the debtor, but generally by his minor son. A few sales were made at a room in which the oils were kept. *Held*, that the wagon and team were exempt under the provision of the Code of Iowa exempting from execution "the horse or team and the wagon or other vehicle by the use of which the debtor, if a physician, public officer, farmer, teamster, or other laborer, habitually earns his living."—*Consolidated Tank-line Co. v. Hunt*, Iowa, 48 N. W. Rep. 1057.

35. EXEMPTIONS—Set-off.—Mill. & V. Code Tenn. § 2931, provides that the wages of every laborer, to the amount of $30, are exempt from execution. *Id.* § 3628, provides that a defendant may set off mutual demands held against plaintiff at the time of suit. *Held* that, in an action by a laborer to recover $30 as wages, a judgment against him, assigned to his employer before suit, cannot be set off.—*Collier v. Murphy*, Tenn., 16 S. W. Rep. 465.

36. FEDERAL COURTS — Jurisdiction — Receivers. — Where the claim made by a railroad company against another is for the retention of rolling stock by receivers appointed by the United States circuit court and by a new corporation to whom it was transferred, after it should have been turned over to claimant, the circuit court, having in the order of transfer reserved the right to determine all claims growing out of the subject-matter, has jurisdiction of the controversy, though the parties are corporations of the same State.—*Central Trust Co. v. Wabash, St. L. & P. Ry. Co.*, U. S. C. C. (Mo.), 46 Fed. Rep. 154.

37. FRAUDULENT CONVEYANCE—Preferences.—A debtor in failing circumstances may prefer one creditor to another, although that creditor may be his wife, and he may in good faith transfer his property at a fair price to her in payment of her *bona fide* claim.—*Winfield Nat. Bank v. Croco*, Kan., 26 Pac. Rep. 942.

38. FRAUDULENT CONVEYANCE—Setting Aside.—In an action by an administrator under Code Civil Proc. Cal. § 1589, to recover property fraudulently conveyed by his intestate in his life-time, the fraudulent intent of the grantor must be alleged in the complaint, and it will not be inferred from the facts set out therein that the conveyance was voluntary, and that intestate was insolvent.—*Threlkel v. Scott*, Cal., 26 Pac. Rep. 879.

39. GAMBLING CONTRACTS.—Const. Cal. art. 4, § 26, providing that "all contracts for the sale of shares of the capital stock of any corporation or association, on margin or to be delivered at a future day, shall be void, and any money paid on such contracts may be recovered," applies to a transaction wherein a broker purchases stock for a customer with his own money, charging only commissions and interest thereon, and retaining the stock as security until its sale, the customer putting up only a certain margin, and receiving the profit or paying the loss.—*Cashman v. Root*, Cal., 26 Pac. Rep 883.

40. GARNISHMENT.—The indebtedness of the principal defendant to the plaintiff need not be submitted to the jury which tries the issue between the plaintiff and the garnishee, and where judgment against the principal defendant is rendered, but not entered until after judgment against the garnishee, the entry may be made *nunc pro tunc*.—*Capital City Bank v. Wakefield*, Iowa, 48 N. W. Rep. 1059.

41. HABEAS CORPUS.—Under Rev. St. Wyo. § 1269, which provides that the court may refuse to issue the writ of *habeas corpus* if, from the showing of the petitioner, he is not entitled to any relief, the writ will not issue in the first instance as of course, but the petitioner must make out a *prima facie* case for its issuance.—*Ex parte Bergman*, Wyo., 26 Pac. Rep. 914.

42. HIGHWAY—Location.—In fixing the definite line of a highway the supervisors may exercise a reasonable discretion in making such variations from the general course stated in the petition as public interests require, and this discretion is not taken away or limited by the fact that the petition describes a definite and particular line.—*State v. Thompson*, Minn , 48 N. W. Rep. 1111.

43. HOMESTEAD.—Upon the facts, *held* that building used by a debtor as a residence for his family and as a hotel was exempt as a homestead.—*Cass County Bank v. Weber*, Iowa, 48 N. W. Rep. 1087.

44. HOMESTEAD — Mortgage — Acknowledgment. — Where a mortgage was given by a married man upon several parcels of real property, including the homestead of the mortgagor, upon which he then resided with his family, and the wife of the mortgagor, then occupying the homestead with him, did not acknowledge the mortgage before any officer authorized to take acknowledgment of deeds, in an action brought by an assignee of the said mortgage, *held*, that the mortgage created no lien upon the homestead.—*Phillips v. Bishop*, Neb., 48 N. W. Rep. 1106.

45. HOMESTEAD—Community—Divorce.—Where a husband and wife, having community property which is occupied by them as a homestead, are divorced without the court in its decree having made any division of the property under Rev. St. Tex. art. 2864, they become tenants in common of the property, as if they had never been married, notwithstanding the wife and minor children continued to occupy it as a homestead.—*Kirkwood v. Domnan*, Tex., 16 S. W. Rep. 428.

46. HOMESTEAD EXEMPTION — Growing Crops. — The homestead right will attach to a lease-hold interest, and, in case of a rural homestead, the exemption will protect from forced sale crops growing thereon.—*Phillips v. Warner*, Tex., 16 S. W. Rep. 423.

47. HUSBAND AND WIFE—Enticing—Evidence.—Where, in an action for enticing away plaintiff's wife, defendant's counsel asks plaintiff if he did not meet his wife at one time when he had another woman in the buggy

with him, plaintiff can explain the circumstances of his riding with the other woman.—*Edgell v. Francis*, Mich., 48 N. W. Rep. 1095.

48. INJUNCTION.—A preliminary injunction is a provisional remedy, the sole object of which is to preserve the subject in controversy in its then condition; the courts of equity, in granting or refusing the same, should in no manner anticipate the ultimate determination of the question of right involved.—*Helms v. Gilroy*, Oreg., 26 Pac. Rep. 851.

49. INSOLVENCY—Dismissal of Petition.—In insolvency proceedings, an order dismissing a petition by a creditor, under section 10 of the insolvent law as amended by Laws 1889, ch. 30, § 7, if made for informality or irregularity, is not appealable; but, if made on the merits, it is appealable, though it give the creditor leave to file another petition.—*Harrison v. Kellogg*, Minn., 48 N. W. Rep. 1132.

50. INSURANCE—Subrogation.—Where property is insured for less than its value, and is destroyed by the negligence of a third party, the insurance companies who have paid the owner the insurance money must, in an action to recover damages for the destruction of the property, be joined with the owner, or if he refuses to join he must be made a party defendant, under the provision of the Oregon Code that an action shall be brought in the name of the real party.—*Home Mut. Ins. Co. v. Oregon Ry. & Nav. Co.*, Oreg., 26 Pac. Rep. 857.

51. INSURANCE—Warranty.—Where, on the face of a fire policy, the property is described as a dwelling-house occupied by tenants, such a statement is a warranty, and becomes a part of the contract, and the assured cannot recover for a loss, unless it is true.—*Boyd v. Vanderbilt Ins. Co.*, Tenn., 16 S. W. Rep. 470.

52. INSURANCE COMPANY.—Under the provisions of chapter III, Sess. Laws, 1875, the business of each class of a mutual fire insurance company must be conducted separately and independently of the other, and in no case shall an assessment be made by the company or association upon the premium notes of one class to pay the losses or expenses of the other.—*Kansas Farmers' Mut. Fire Ins. Co. v. Amick*, Kan., 26 Pac. Rep. 944.

53. INSURANCE POLICY—Prima Facie Evidence.—Acts 18th Gen. Assem. Iowa, ch. 211, § 3, provides that in a suit on any policy of insurance, "in case of the loss of any building so insured," the sum stated in the policy shall be *prima facie* evidence of the value of the property, and it shall only be necessary for the assured to prove "the loss of the building insured," and due notice of the loss: *Held*, that the amount stated in a policy was not *prima facie* evidence of the value of personal property insured.—*Joy v. Security Fire Ins. Co.*, Iowa, 48 N. W. Rep. 1049.

54. INTOXICATING LIQUORS—Civil Damage Law.—In a suit to have a judgment under the civil damage act declared a lien on the building in which the liquor was sold, a wife, whose husband rented the premises to a saloon-keeper, and looked after them for her, is chargeable with his knowledge that intoxicating liquors were being sold on the premises, contrary to law.—*Johnson v. Grimminger*, Iowa, 48 N. W. Rep. 1052.

55. INTOXICATING LIQUORS—Civil Damage Law—Damages.—The exemplary damages allowed by statutes of Michigan authorizing a suit for damages by any one injured by reason of a person's intoxication against the person furnishing the liquor, are punitory in their character, and designed to punish the defendant for some positive wrong willfully inflicted on or caused the plaintiff, or for some very gross neglect of plaintiff's rights in furnishing liquor.—*Peacock v. Oaks*, Mich., 48 N. W. Rep. 1082.

56. JUDGMENT—Conditions.—A court has no right to require as a condition precedent to the entry of final judgment that a part of said judgment be first paid.—*People v. Graham*, Colo., 26 Pac. Rep. 936.

57. JUDGMENT—Husband and Wife—Fraudulent Conveyances.—Where a debtor purchases land jointly with his wife, his undivided half may be subjected to the payment of a judgment obtained against him, as it will be presumed, in the absence of a showing to the contrary, that he paid half of the price.—*Newlove v. Callaghan*, Mich., 48 N. W. Rep. 1096.

58. JUDGMENT—Partnership.—When a partnership creditor has, by proceedings at law, acquired a judgment, execution or other lien upon the separate property of one of the partners, or has taken any proceedings whereby, at law, he has secured the right to appropriate such separate estate to the satisfaction of an obligation incurred by the partnership, equity will not, at the instance of any individual creditor of such individual partner, wrest such right from the partnership creditor, nor compel him to postpone his proceedings until the individual creditors of the partner whose separate estate has been levied upon have first received satisfaction therefrom.—*Barrett v. Furnish*, Oreg., 26 Pac. Rep. 861.

59. JUDGMENT—Setting Aside.—A suit to have a judgment and a sale of land under a *venditioni exponas* issued thereon declared void, will not lie, where the alleged invalidity would appear on their face, and no extrinsic facts showing invalidity are averred.—*Morgan v. Lehman*, Ala., 9 South. Rep. 314.

60. LEASE BY CITY—Renewal.—Where a city rents a room for one year, with the right of renewal, at a rental payable quarterly, and the officers of the city occupy the room and the rent is paid by the city for several years, no agreement for the creation of a tenancy from year to year will be implied, and the city will be bound only for the time the room is occupied.—*City of San Antonio v. French*, Tex., 16 S. W. Rep. 440.

61. LIMITATIONS—Acknowledgment.—After the statute of limitations had run, the creditor drew on the debtor. The latter wrote: "When I last saw you I explained to you that everything I had was tied up, and that the first debt I paid would be yours." "By doing the way you have it seems to me you desire to advertise the fact that I am in debt." "I wish to say to you plainly that drawing on me is not making your claim better. If you are not satisfied with delay and my excuses sue me as a man, but cease persecuting me. I am good for any judgment obtained against me:" *Held*, that the letter was sufficient to remove the bar of the statute, under Rev. St. Tex. art. 3219.—*Russ v. Cunningham*, Tex., 16 S. W. Rep. 446.

62. LOGS AND LOGGING—Driving Logs of Others.—One who would avail himself of the benefit of the statute allowing persons to drive the logs of others at the expense of the latter, under specified circumstances, must actually drive such logs. It is not enough for him to merely get them out of his own way, without further effort to keep them afloat in the stream.—*Miller v. Chatterton*, Minn., 48 N. W. Rep. 1109.

63. LOGS AND LOGGING—Liens.—Under Laws Wis. 1889, ch. 413, § 17, providing that no lien shall be had on logs for "supplies," there can be no lien for board furnished men employed in getting out, rafting, or running the logs.—*Bradford v. Underwood Lumber Co.*, Wis., 48 N. W. Rep. 1105.

64. MALICIOUS PROSECUTION—Probable Cause.—In an action for malicious prosecution a charge that asserts defendant's immunity unless the jury find he had "no" ground for the prosecution except a desire to injure plaintiff was properly refused, since there might have been other grounds falling short of the probable cause which would justify the prosecution.—*Lunsford v. Deitrich*, Ala., 9 South. Rep. 308.

65. MARRIAGE.—In an action against a husband for medical treatment of his wife, it appeared that the parties had been formally married and cohabited until they learned that a divorce from a former wife was invalid, whereupon they discontinued cohabitation, but still acknowledged each other as husband and wife. The evidence as to the invalidity of the divorce, and that the first wife was living, was elicited by defendant on cross-examination, and was hearsay: *Held*, not sufficient to rebut the presumption of marriage, although

no objection to the evidence was made.—*Gerlach v. Turner*, Cal., 26 Pac. Rep. 870.

66. MARRIAGE— Validity.—Where a woman marries believing her former husband to be dead, but, hearing that he is still alive, commences divorce proceedings, which she discontinues on reliable information of his death, and then marries her second husband again, she is the lawful wife of the second husband.—*Sneathen v. Sneathen*, Mo., 16 S. W. Rep. 497.

67. MASTER AND SERVANT — Defective Machine.—An employer is liable for an injury to an employee caused by a defective machine, even though the negligence of a co employee may have contributed to the accident.—*Young v. New Jersey, etc. Ry. Co.*, U. S. C. C. (N. Y.), 46 Fed. Rep. 160.

68. MECHANIC'S LIEN.—A suit to foreclose a mechanic's lien is equitable in its nature, and is not transformed into an action at law by defendants interposing a legal defense by way of counter-claim.—*Kilroy v. Mitchell*, Wash., 26 Pac. Rep. 865.

69. MECHANIC'S LIEN.—In an action by a subcontractor for the erection of a county court house against the contractor, in which the county is joined as a party defendant, and a lien on the court house is sought to be established, if the county suffers default, and a decree is entered foreclosing the lien, it will not prejudice the rights of the contractor, and will not be available on his writ of error from a judgment against him also.—*Loonie v. Burt*, Tex., 16 S. W. Rep. 439.

70. MECHANIC'S LIEN LAW — Constitutional Law.—Where all the material or labor for a building had been furnished or performed before the law took effect (October, 1st), the provisions of the old law relating to lien statements applied, although such statements were not filed until after that date; but where part of the material or labor was furnished or performed before, and part after, October 1st, the provisions of the new law applied; following former decisions.—*Bardwell v. Mann*, Minn., 48 N. W. Rep. 1120.

71. MORTGAGE—Cancellation for Fraud —If the creditor operated upon the fears of the husband by threats of arrest and imprisonment believed by him to be imminent, and thus overcomes his will, and through fear and undue influence compels him to sign the mortgage, the signature is not binding; and, if the wife is induced to execute the mortgage from fear excited by threats made to her by the creditor of an illegal criminal prosecution against her husband, the instrument thus obtained will not be binding upon her.—*Winfield Nat. Bank v. Croco*, Kan., 26 Pac. Rep. 939.

72. MORTGAGE—Deed.—Facts *held* not sufficient to establish the character of the deed herein, as a mortgage.—*Etheridge v. Wisner*, Mich., 48 N. W. Rep. 1087.

73. MORTGAGE—Payment.—Where the consideration named in a deed is the payment of a prior mortgage, a payment of such mortgage by the grantee extinguishes it, even though he attempts to keep the mortgage alive by taking an assignment of it.—*Fouch v. Delk*, Iowa, 48 N. W. Rep. 1078.

74. MORTGAGE — Redemption.— Where a widow and heir at law of a decedent have obtained a decree declaring a deed executed by him, absolute in form, a mortgage, the mortgagees are entitled to the value of their improvements, when the widow has so agreed, and the heir, though informed by her of such agreement, has not objected.—*Harrell v. Stapleton*, Ark., 16 S. W. Rep. 474.

75. MUNICIPAL CORPORATION—Assessments for Public Improvements.—*Held*, that the variance between the contract and the ordinance herein did not invalidate tax-bills issued in payment for work done under the contract.—*Cole v. Skrainka*, Mo., 16 S. W. Rep. 491.

76. MUNICIPAL CORPORATION—Defective Streets.—The cover of a man hole fell to the bottom of a sewer. The hole was left open, and a week afterwards plaintiff fell into it while crossing the street. In a suit against the city, the court charged that it was guilty of negligence if it suffered the hole to remain without cover, knowing that it was open, or where, by the exercise of ordinary care, it might have known it. *Held*, that the instruction was not open to the objection that it left out of consideration the question whether the city had time to repair the defect after it was chargeable with notice.—*Barr v. Kansas City*, Mo., 16 S. W. Rep. 483.

77. MUNICIPAL CORPORATION—Ordinance.—That part of an ordinance of a municipal corporation wherein was fixed the maximum rates or charges to be made to the consumers of water furnished by a corporation organized for that purpose, construed.—*Allen v. Duluth Gas & Water Co.*, Minn., 48 N. W. Rep. 1128.

78. MUNICIPAL CORPORATIONS—Taxation.—A city had done some work on a street as far out as a certain farm, which was inside the corporate limits, and about a mile from the platted portion of the city, and had removed nuisances therefrom, and police protection had been afforded in the immediate vicinity on sundry occasions. *Held*, that the farm was within the range of municipal improvements and benefits, and subject to taxation.—*Cook v. Crandall*, Utah, 26 Pac. Rep. 927.

79. MUNICIPAL ORDINANCES—Quarantine.—In the absence of an epidemic showing an apparent necessity therefor, an ordinance prohibiting any one from bringing second-hand clothing into a town, or exposing it for sale therein, without furnishing proof to the mayor that it did not come from an infected district, is not a valid exercise of the charter power to establish and enforce quarantine regulations, but is an unreasonable restraint of trade.—*Town of Kosciusko v. Slomberg*, Miss., 9 South. Rep. 297.

80. MUTUAL BENEFIT INSURANCE—Plaintiff's son became a member of one of the subordinate lodges of defendant association, thereby becoming entitled to and receiving from defendant its certificate or policy of insurance, in which he designated his lodge as a beneficiary, in case of his decease. The lodge, as well as defendant, were unincorporated voluntary associations, for the mutual aid, benefit, and insurance of their members. *Held*, upon the death of the assured son, that the father could not be permitted to question the legal existence of the lodge, or its capacity to take as such beneficiary.—*Bacon v. Brotherhood of Railroad Brakemen*, Minn., 48 N. W. Rep. 1127.

81. NEGLIGENCE—Defective Sidewalks.—In an action for personal injuries occasioned by a defective sidewalk, plaintiff's knowledge of the existence of the defect is not conclusive evidence of contributory negligence.—*Argus v. Village of Sturgis*, Mich., 48 N. W. Rep. 1085.

82. NEGLIGENCE—Evidence.—In a suit for an injury to a customer from falling into the well of an elevator in a store, it is competent to ask a witness whether at the time of the accident the light was such that the well could have been easily seen.—*Snyder v. Witner*, Iowa, 48 N. W. Rep. 1046.

83. NEGLIGENCE—Exemplary Damages.—In an action to recover damages for personal injuries, where there is no testimony showing that the negligence complained of is so gross as to amount to wantonness, and no willful or malicious acts are proven, it is error for the trial court to instruct the jury that "they are at liberty to award what are termed 'exemplary' or 'punitive' damages; that is, damages which are given, not on account of any special merit in plaintiff's case justifying the same, but as a warning and lesson to the defendant, to teach it greater respect and care for the rights safety of others."—*Chicago, K. & W. R. Co. v. O'Connell*, Kan., 26 Pac. Rep. 947.

84. NEGOTIABLE INSTRUMENT.—An agreement written on a note that it is given for a piano, the title and ownership of which is to remain in the name and subject to the order of the payee until it is fully paid, does not render it non-negotiable.—*W. W. Kimball Co. v. Mellon*, Wis., 48 N. W. Rep. 1100.

85. NEGOTIABLE INSTRUMENT—Joint Administrators.—In an action on a note given to the administrators of a decedent's estate, a parol agreement between defend-

ant, who was one of the makers, and one of the payees, who in his individual capacity was one of the makers, that defendant should be liable only for one half of the amount of the note, and that such co-maker would be liable for and pay the other half, will be no defense, even if it were assented to by the other payee, and has been executed by defendant by making payment of his agreed proportion.—*Clark v. Grambling*, Ark., 16 S. W. Rep. 475.

86. NEGOTIABLE INSTRUMENT.—Parol Evidence.— Action against the defendant as indorser upon the following promissory note: "$1,000. Minneapolis, May, 12th, 1884. Six months after date we promise to pay to the order of A. J. Boardman, treasurer, one thousand dollars. [Signed] Minneapolis Eng. & Machine Works. By A. L. Crocker, Sec'y. [Indorsed]: A. J. Boardman, treasurer." *Held*, that the indorsement is *prima facie* the individual contract of the defendant, but that extrinsic evidence is admissible to show that he made it only in his official capacity as treasurer of the maker corporation, and as its indorsement.—*Souhegan Nat. Bank v. Boardman*, Minn., 48 N. W. Rep. 1116.

87. PARTNERSHIP—Evidence. — A declaration of one person that another not present is his partner, is not competent evidence, in proof of partnership, to charge the other, although proper as against the party making the declaration.—*McNamara v. Eustis*, Minn., 48 N. W. Rep. 1123.

88. PARTNERSHIP—Evidence.—Where in a suit against two as partners the partnership is denied by one, evidence of the other's declarations, made in his co-defendant's absence, that they were partners and of general repute to the same effect, is inadmissible to prove the partnership.—*Emberson v. McKenna*, Tex., 16 S. W. Rep. 419.

89. PARTNERSHIP—Release by One Partner.—Where suit is brought by partners for an injury to firm property, and one of them releases his interest in the cause of action to defendant, and asks that the action be dismissed, it is not error to allow the other partner to continue the action, and to recover the value of his half interest in the property destroyed, under Rev. St. Mo. 1889, § 2207, providing that judgment may be given for or against one or more of several plaintiffs.—*Hoover v. Missouri Pac. Ry. Co.*, Mo., 16 S. W. Rep. 480.

90. PAYMENT—Recovery.—Where the owner of land, on the representation of another that he has an interest therein, pays him money for a release of his claim, with the understanding that it is to be repaid if he has no interest, he may recover the money if it is ascertained that the claimant has no interest, though a person who was present with such claimant when the land was purchased has stated to the owner the facts attending the purchase.—*Putnam v. Dungan*, Cal., 26 Pac. Rep. 904.

91. PLEADING — Assumpsit. — Where an instrument consisting of a promise to pay money in the form of a note, to which is added a power of attorney to confess judgment thereon against the maker, is declared on under the common counts by the payee mentioned therein, and it is averred to be plaintiff's sole cause of action, such instrument is admissible in evidence notwithstanding it is not negotiable under the law merchant.—*Conrad Seipp Brewing Co. v. McKittrick*, Mich., 48 N. W. Rep. 1086.

92. PLEDGE—Sale.—Where a pledgee, without notice to the pledgeor, sells the pledge, and in fact itself becomes the purchaser, so that it is able to return the pledge, and then gives notice of the intention to sell, there is no conversion.—*Terry v. Birmingham Nat. Bank*, Ala., 9 South. Rep. 299.

93. PROHIBITION.—Under Const. Mo. 1875, art. 6, § 3, and Amend. 1883, § 8, giving the supreme court jurisdiction to issue writs of prohibition, and to hear and determine the same, and Rev. St. Mo. 1889, § 3243, providing that all courts shall have power to issue all writs which may be necessary in the exercise of their respective jurisdictions, "according to the principles and usages of law," a judge of the supreme court may in vacation issue an order to defendants to show cause at its following term why a writ of prohibition should not be issued.—*State v. Rombauer*, Mo., 16 S. W. Rep. 502.

94. RAILROAD COMPANIES—Contract—Assignment.—A contract between the C., R. I. & C. R. Co. and defendant company, giving the former the right to use the latter's tracks, depots, etc., stipulated that the contract should be binding on the lessees, assigns, grantees and successors of each company during the continuance of their franchises, and provided that the former company could assign its interest in the contract only by sale, lease or consolidation of its own property: *Held*, that an assignment or conveyance by the C., R. I. & C. Co. of its interest in the contract by virtue of leases, sales and consolidation of its property, carried with it all the rights of said company under the contract.—*Chicago, R. I. & P. Ry. Co. v. Denver & R. G. R. Co.*, U. S. C. C. (Colo.), 46 Fed. Rep. 145.

95. RAILROAD COMPANIES—Fires.—While railway companies are not bound to use every possible precaution which the highest scientific skill might have suggested to prevent the escape of fire from their locomotives, yet they are required to exercise a degree of care reasonably proportionate to the risks to be apprehended; and, in view of the great danger to property from fires communicated from passing locomotives, reasonable care requires that they should avail themselves of the best approved practical appliances for the prevention of such fires.—*Hoy v. Chicago, etc. Ry. Co.*, Minn., 48 N. W. Rep. 1117.

96. RAILROAD COMPANIES—Stock Killing.—Where, in a suit against a railway company for a Hereford bull, injured by its train, it is shown that there is no market for such an animal in the county where killed, his market value in counties where there is a market for such animals may be shown, but a witness cannot testify what he thinks the bull would bring from any one that wanted a bull.—*Gulf, C. & S. F. Ry. Co. v. Dunman*, Tex., 16 S. W. Rep. 421.

97. RAILROAD COMPANIES — Street Railway — Negligence.—Where a passenger on a street railway car is brought into apparent imminent danger from a collision at a railroad crossing by the negligence of the motor-man in attempting to cross when he could see that there was a probability of the engine reaching there first, she can recover for injuries received in attempting to flee from it, though she would have been uninjured if she had kept her seat.—*Shankenberg v. Metropolitan St. Ry. Co.*, U. S. C. C. (Mo.), 46 Fed. Rep. 177.

98. REAL ESTATE AGENT — Revocation.— Where the owner enters into a contract authorizing a real estate agent to sell his land on commission, within a certain time, he cannot revoke the authority, and escape liability to the agent, if he secures a purchaser before the time limited, as the result of efforts commenced before such revocation.—*Blumenthal v. Goodall*, Cal., 26 Pac. Rep. 906.

99. REFEREE—Oath.—Where a referee is sworn in open court in the presence of the attorneys for both parties, who appear before him and go to trial without objection, his report cannot be set aside because he did not take and subscribe an oath as required by Rev. St. Mo. § 2143.—*Vogt v. Butler*, Mo., 16 S. W. Rep. 512.

100. REPLEVIN—Judgment.— In replevin for a mare and colt, it is no ground for vacating the judgment that there was not a separate finding of the value of each article; the mare and colt being so intimately connected as to constitute one whole.—*Henry v. Dillard*, Miss., 9 South. Rep. 298.

101. REPLEVIN—Pleading — Exhibit.—In an action of replevin, an exhibit containing a description of the property, in order to become a part of the complaint, must be annexed and attached thereto. It is not sufficient to file the same as a separate paper, although referred to in the complaint, and alleged to be a part thereof.—*Riley v. Pearson*, Oreg., 26 Pac. Rep. 849.

102. SALE—Counter-claim.—In an action by a vendor

against his vendee for the purchase price of personal property a clause in the answer for damages for the breach of a warranty of the quality of the property constitutes a "counter-claim."—*Schurmeir v. English*, Minn., 48 N. W. Rep. 1112.

103. SEDUCTION—Limitations.—Code Tenn. § 3469, provides that an action for seduction must be brought within one year after the cause of action accrues. Complainant alleged that defendant, on a certain date, and at divers other times from that date to the commencement of suit, promised to marry his minor daughter if she would yield to him and satisfy his passions, whereby she was seduced: *Held*, that the statute did not begin to run from the time of the act first alleged, and the complaint was good.—*Davis v. Young*, Tenn., 16 S. W. Rep. 473.

104. SLANDER—Damages.— The defendant's belief in the truth of a slander, and his good faith in uttering it, though proper to be shown in mitigation of damages, are not sufficient to deprive the plaintiff of the right to recover substantial damages.—*Blecker v. Schaff*, Iowa, 48 N. W. Rep. 1079.

105. TAXATION — Corporation—Capital Stock.—Under the charter of the town of Shelbyville, authorizing it to tax the capital stock of banks and other corporations doing business in the town, a trust company, organized to act as trustee, administrator, etc., can be taxed on its entire capital stock of $50,000, though only $5,000 of it is actually paid in.—*Shelby County Trust Co. v. Board of Trustees*, Ky., 16 S. W. Rep. 460.

106. TAXATION—Exemptions.—Chapter 43, Laws 1854, incorporating "Hamline University of Minnesota," providing that "all corporate property belonging to the institution, both real and personal, is and shall be free from taxation," applies to all property of the corporation which it lawfully might acquire and hold under the terms of the act, and is not limited to property actually used and occupied by it as a site for the university.—*State v. Hamline University*, Minn., 48 N. W. Rep. 1119.

107. TAX-TITLES — Frauds.—Code Iowa, § 902, limits actions to recover land sold for taxes to five years from the recording of the tax deed. Section 897 provides that, if the fraud of the purchaser shall be established, "the sale and title shall be void:" *Held*, in a suit to quiet title brought by the holder of the tax deed five years after it had been recorded, that defendant could not attack the tax deed on the ground that the purchaser at the tax sale was the agent of the owner of the land, and had in his hands money with which he ought to have paid the taxes.—*Waggoner v. Mann*, Iowa, 48 N. W. Rep. 1065.

108. TRADE-MARKS — Infringement.—The trade mark of "Magic Headache," used on packages labeled "Gessler's Magic Headache Wafers; a positive cure for the headache and neuralgia"—with directions as to taking; "Manuf'd by Max Gessler, manuf'g chemist, Milwaukee, Wis. Price, 35 cts."—is not infringed by the use of similar packages, with similar labels and directions, but reading, "Brown's Alpha Wafers; a positive cure for headache and neuralgia;" "Manufactured at Brown's Pharmacy, Marquette, Mich. Price, 35 cts.—*Gessler v. Grieb*, Wis., 48 N. W. Rep. 1098.

109. TRESPASS TO TRY TITLE.—Where defendant, in trespass to try title brought by co-tenants, has, by adverse possession, acquired title against a number of them, one of the plaintiffs cannot recover the interest of another of the co-tenants, who is not a party to the suit.—*Boon v. Knox*, Tex., 16 S. W. Rep. 448.

110. TROVER—Damages.—A count "for that the defendants converted to their own use, or wrongfully deprived the plaintiff of the use of, plaintiff's goods," is in trover, the measure of damages in which is the value of the goods at the time of the conversion, with interest from that time to the day of the verdict.—*Heinekamp v. Beaty*, Md., 21 Atl. Rep. 1098.

111. TRUST—Creation.—Where a married woman conveys her property to a trustee, to hold for her sole use during her life, "and after her death for that of her children, the survivors or survivor," and afterwards all the children, being of full age, unite with the trustee in a reconveyance of the property to their mother, she reacquires the absolute title in fee-simple, and can convey it free from the trust created by her first deed.—*Ormsby v. Dumesnil*, Ky., 16 S. W. Rep. 459.

112. USURY—Bonus for Loan.—Where the agent of a money-lender, with the knowledge of his principal, takes from the borrower a commission, which, combined with the rate of interest charged, is in excess of the rate allowed by law, the loan must be held to be usurious.—*Banks v. Flint*, Ark., 16 S. W. Rep. 477.

113. VENDOR'S LIEN—Foreclosure.—Where, in a proceeding to foreclose a vendor's lien, the property was imperfectly described in the petition, one of the six calls being accidentally omitted, but the petition also referred to several deeds by which the property had been conveyed, it was not error in the judgment to supply the omitted call, and the judgment will not be set aside as not being warranted by the evidence.—*Brown v. McKee*, Texas, 16 S. W. Rep. 435.

114. WATER RIGHTS—Public Lands.—A person has the right to go upon the public lands of the United States, and to appropriate the waters to the purposes of mining, milling, agriculture, or any other lawful purpose, and priority of appropriation gives priority of right, and the rights of the riparian owners, when they attach, are subject to the rights thus acquired.—*Speake v. Hamilton*, Oreg , 26 Pac. Rep. 855.

115. WILLS — Charitable Bequests.—Under the Kentucky statute of wills, providing that a person "may by will dispose of any estate, right, or interest in real or personal estate that he may be entitled to at his death," and chapter 13, § 1, declaring that devises for any "charitable or humane purpose" shall be valid, a devise of a life estate to testator's wife with directions that at her death the whole estate shall be converted into money, and applied to the purchase of a monument to be erected over the graves of himself and wife, is valid.—*Ford v. Ford's Ex'r*, Ky., 16 S. W. Rep. 451.

116. WILLS—Construction.—Testator devised the residue of his estate, consisting almost entirely of personal property in trust to pay the income to his daughter, "the remainder to go to her heirs forever," with the right in the daughter to take a portion of the principal. *Held*, that the heirs would take by purchase and not by limitation, and that the daughter took an equitable life estate only.—*Leake v. Watson*, Conn., 21 Atl. Rep. 1075.

117. WILLS—Undue Influence—Declarations.—A testatrix having left substantially all her property to her living children, a grandchild, whose parents were dead, endeavored to set aside the will on the ground of undue influence on the part of a certain son. *Held*, that declarations made by him not in testatrix's presence, whether before or after the making of the will, were inadmissible, since there were others interested in the probate thereof.—*Eastis v. Montgomery*, Ala., 9 South. Rep. 311.

118. WILLS—Undue Influence.—On contest of a will on the ground of the undue influence of the principal legatee, where it appears that such legatee took testator from his home, where the will could have been executed into the country, before a justice of the peace, where he assisted in making the will, evidence of his acts and declarations prior to the execution of the will, tending to show his anxiety that it should be made in his favor, and his activity in procuring its execution is admissible.—*Wilbur v. Wilbur*, Ill., 27 N. E. Rep. 701.

119. WITNESS—Transactions with Decedent.—In a suit by an administrator, the defendant pleaded payment, and offered in evidence certain checks drawn by him on a bank, and payable to the plaintiff's intestate or bearer. *Held*, that it was competent for the defendant to testify that he did not deliver any of the checks to any person other than the plaintiff's intestate.—*McElhenney v. Hendricks*, Iowa, 48 N. W. Rep. 1056.